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No. 01-_____

IN THE
SUPREME COURT OF THE UNITED STATES

ARCADIS GERAGHTY AND MILLER, INC.,

Petitioner,

v.

CONOCO INC.; CONDEA VISTA COMPANY,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit err by construing CERCLA's statute of limitations so as to exempt from limitations a cause of action against a contractor that participated in environmental investigation of a contaminated site, such that the site-owners's lawsuit is never time-barred as a matter of law?

2. Did the Fifth Circuit err by extending CERCLA liability for "operators" of hazardous substance facilities to an environmental contractor whose contractual duties were limited to mere design and placement of groundwater monitoring wells at the direction of the facility's owner?

3. Did the Fifth Circuit err by extending CERCLA liability for parties who "arranged for disposal" of hazardous substances to an environmental contractor that made no arrangement with intent to dispose of hazardous substances that allegedly caused damage?

PARTIES TO THE PROCEEDING

All the parties in the United States Court of Appeals for the Fifth Circuit are identified in the caption, except that ARCADIS Geraghty & Miller, Inc. was formerly named Geraghty & Miller, Inc.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

ARCADIS Geraghty & Miller, Inc., is wholly owned by its parent company, ARCADIS, N.V.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner ARCADIS Geraghty & Miller, Inc. ("G&M"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit (App., *infra*, 1a-29a) is reported at 234 F.3d 917. The order of the Fifth Circuit denying the petition for rehearing (App., *infra*, 30a-31a) is not reported. The opinion of the District Court for the Southern District of Texas ("District Court") (App., *infra*, 32a - 47a) is reported at 27 F. Supp. 2d 918. The order of the District Court denying rehearing/new trial (App., *infra*, 48a-49a) is not reported.

JURISDICTION

The judgment of the Fifth Circuit was entered on December 14, 2000. The timely petition for rehearing was denied on January 11, 2001. This petition was filed within 90 days of January 11, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 to 9675, are 42 U.S.C. §§ 9607(a) and 9613(g)(2). App., *infra*, 50a-52a.

STATEMENT

This case derives from environmental investigation and remediation activities conducted at the Lake Charles Chemical Complex ("LCCC") located in Lake Charles, Louisiana. The LCCC's owners, respondents Conoco Inc. and Condea Vista Company, brought the claim under the CERCLA, 42 U.S.C. §§ 9601 to 9675, in an attempt to recover remedial costs from petitioner G&M, an environmental and engineering consultant hired by respondents to provide investigative services at the LCCC.

Respondent Condea Vista Company currently owns the LCCC and respondent Conoco Inc. is the site's former owner. Collectively, Conoco Inc. and Condea Vista Company have owned and operated the LCCC from 1961 to the present.[1] App., *infra*, at 2a.

Beginning in 1968, Conoco began managing, among other chemicals, ethylene dichloride ("EDC") at the LCCC. App., *infra*, at 34a. Over the course of Conoco's operations at the LCCC, EDC was released into the environment. *Id.* Consequently, EDC migrated into soil and groundwater, *id.*, causing severe environmental contamination.

In the early 1980s, the Louisiana Department of Environmental Quality ("LDEQ") issued an order requiring Conoco to investigate and address contamination at the LCCC. In connection with this process, Conoco and G&M executed a document entitled "Engineering Services

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[1] For clarity, respondents Conoco and Condea Vista are hereinafter referred to collectively as "Conoco."

Contract" ("Engineering Contract") on March 12, 1985. Under the terms of the Engineering Contract, G&M agreed to furnish to Conoco certain services required for a "Ground-Water Quality Assessment, Phase 2" at the LCCC. *Id.* at 2a-3a.

The Phase 2 assessment was aimed at assessing the extent and nature of groundwater contamination below a portion of the LCCC. G&M's contractual tasks included engineering design plans for installation of 50 groundwater wells used for monitoring possible contamination, installing the monitoring wells, and sampling the monitoring wells following installation. *Id.* at 3a. G&M completed installation of the monitoring wells on July 23, 1985. *Id.*

In 1985, Conoco began to suspect that the monitoring wells had technical and physical problems. Based on a consultant's recommendations, Conoco plugged and abandoned four of the wells in 1988 and 1989. *Id.* at 36a. According to Conoco, their experience plugging and abandoning the wells gave them reason to be concerned about the remaining wells that G&M had installed under the Engineering Contract. *Id.* In 1993, Conoco sued G&M in Texas state court alleging breach of contract and other state-law causes of action as a result of the allegedly defective wells. *Id.* at 5a.

On April 4, 1997, G&M sued Conoco in the District Court. G&M alleged claims under CERCLA for recovery of investigation costs related to Conoco's allegations that G&M exacerbated contamination at the LCCC. On June 24, 1997, Conoco filed a counterclaim which is the subject of this appeal. *Id.* at 37a. Among other claims, Conoco alleged that G&M was liable under CERCLA Section

107(a) (codified at 42 U.S.C. § 9607(a)) as an "operator" of a facility and an "arranger" of hazardous substances disposed at the LCCC. On December 2, 1997, Conoco sought leave to file an amended answer, through which Conoco attempted to combine the state and federal lawsuits by filing its state law causes of action as counterclaims. The District Court granted Conoco leave to file the amended answer on December 23, 1997. *Id.* at 3a. G&M subsequently dismissed its CERCLA claims pursuant to stipulation, leaving only Conoco's counterclaim for adjudication by the court. *Id.* at 5a.

On February 9, 1998 G&M filed a motion for partial summary judgment arguing that it was not liable under CERCLA as a matter of law. The District Court denied G&M's motion on June 2, 1998.

On September 14, 1998, G&M sought leave to file an additional motion for partial summary judgment. *Id.* at 5a. The proposed motion argued that Conoco's CERCLA counterclaims were barred by CERCLA's statute of limitations because Conoco filed them more than six years after the initiation of "physical on-site construction" of the remedial action at the LCCC. *See* CERCLA § 113(g)(2)(B) (codified at 42 U.S.C. § 9613(g)(2)(B)). On September 23, 1998, the District Court denied G&M leave to file the proposed motion.

When the parties appeared for trial on the scheduled date, the District Court discussed the case with counsel and suspended the start of the trial. App., *infra*, 5a. In October 1998, after reconsidering the arguments for summary judgment, the District Court granted summary judgment for G&M on all of Conoco's claims. *Id.* at 32a. In determining whether G&M was a liable "covered person"

(including an "arranger" or "operator") under CERCLA Section 107(a), the District Court analyzed the role that G&M played with regard to the LCCC. *Id.* at 45a-47a. In particular, the District Court noted that "G&M was merely an environmental contractor employed to investigate and assist in constructing a facility for remedying contamination already in the soils." *Id.* at 45a. The District Court also recognized that G&M was under Conoco's supervision and therefore, the type and location of the wells at issue were directed by Conoco and the state of Louisiana. *Id.* at 47a. The District Court further determined that G&M never intended to arrange for, manage or transport Conoco's hazardous waste. *Id.* As a result, the District Court concluded that G&M was not an "arranger" or "operator" (or for that matter "owner" or "transporter") for purposes of CERCLA Section 107(a). *Id.* at 45a, 47a.

With regard to the CERCLA statute of limitations, the District Court determined that Conoco initiated a "remedial action" in 1987 when Conoco hired I.T. Corporation to begin construction of a system for remediating groundwater. *Id.* at 46a. The District Court applied CERCLA Section 113(g)(2)(B), *id.*, which provides that an action must be brought "within 6 years after initiation of physical on-site construction of the remedial action . . . ." 42 U.S.C. § 9613(g)(2)(B). The District Court determined that since the "remedial action" was initiated in 1987, Conoco had until 1993 to bring its CERCLA suit. App., *infra*, 46a. Because Conoco first asserted its CERCLA counterclaim in 1997, Conoco's counterclaim was time barred. Conoco filed a motion for rehearing which was denied on December 3, 1998. *Id.* at 48a-49a.

Conoco appealed to the Fifth Circuit. Conoco raised several issues on appeal, including the District Court's finding that G&M was not an "operator" or "arranger" and that Conoco's counterclaim was barred by limitations. In G&M's Answering Brief, G&M argued that the statute of limitations had run because undisputed facts showed that remedial action began at the site more than six years before Conoco filed its counterclaim. In addition, G&M argued that it could not be an "operator" because undisputed facts showed it lacked control over activities relating to alleged disposal of hazardous waste. G&M further argued that it could not be an "arranger" because among other reasons, undisputed facts showed that G&M had no intent to dispose of hazardous substances.

The Fifth Circuit reversed with respect to the CERCLA issues and remanded to the District Court. *Id.* at 29a. With regard to the CERCLA statute of limitations, the Fifth Circuit agreed with G&M that CERCLA Section 113(g)(2) contained the applicable limitations period. *Id.* at 11a. The Fifth Circuit was then faced with determining whether CERCLA Section 113(g)(2)(A) or 113(g)(2)(B) applied. *Id.* at 12a. Section 113(g)(2)(A) includes a three-year limitations period triggered by completion of a "removal action." Section 113(g)(2)(B) includes a six-year limitations period triggered by on-site construction of a "remedial action." Accordingly, the Fifth Circuit needed to decide which type of response activity, "removal action" or "remedial action," occurred at the LCCC.

CERCLA Section 101 includes definitions for "removal" and "remedial action."[2] Although the definitions

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[2] 42 U.S.C. section 9601(23) defines "remove" or "removal" as follows:

> (23) The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.].

42 U.S.C. section 9601(24) defines "remedy" or "remedial action" as follows:

> (24) The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement,

are stated in general terms and overlap, courts have generally found that a "removal action" is a short-term cleanup measure. *See, e.g., Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986); *Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc.*, 100 F.3d 792, 797 (10th Cir. 1996). On the other hand, a "remedial action" is typically a long-term measure aimed at achieving a permanent remedy. *See, e.g., Exxon,* 175 U.S. at 360. While the lines have often been blurred between the two types of actions, courts have uniformly determined that site investigation activities constitute removal actions. *See Greene v. Product Mfg. Corp.*, 842 F. Supp. 1321, 1325 n. 6 (D. Kan. 1993) (stating that courts agree that investigation and testing of groundwater constitute "removal" actions).

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perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

In order to determine whether actions at the LCCC were "removal" or "remedial," the Fifth Circuit had to determine which actions were relevant to the statute of limitations. Although the District Court considered response activities conducted by Conoco consultants after G&M completed its work, App., *infra*, 46a, the Fifth Circuit considered only those response activities that occurred during the time G&M was working at the site. As a result, the Fifth Circuit did not consider activities after 1985, when G&M completed installation of the monitoring wells.[3] Instead, the Fifth Circuit focused on G&M's installation of the monitoring wells and concluded that those activities were "removal" because they related to site investigation. *Id.* at 15a-17a. Consequently, the Fifth Circuit applied Section 113(g)(2)(A) and further determined that the statute of limitations had not run, thereby reversing the District Court's judgment and order.[4] *Id.* at 17a.

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[3] Although G&M continued to sample the monitoring wells for approximately a year after installation, the Fifth Circuit apparently did not find that 1985-1986 time period relevant. In any event, G&M asserts that the "remedial" action began in 1987, so that the 1985-1986 time period is of no consequence.

[4] The Fifth Circuit's focus on groundwater monitoring and investigation activities (i.e. monitoring well construction) and its disregard of later response activities allowed it to make an easy determination with respect to the type of response activity involved. As indicated earlier, courts uniformly hold that groundwater investigation and monitoring activities constitute "removal" action. *See supra* p. 8. Unfortunately, the court avoided the more difficult question of whether later response action activities constituted "removal" or "remedial" action.

In determining that summary judgment was not appropriate with regard to G&M's "operator" liability, the Fifth Circuit started its analysis with the definition of "operator." App., *infra*, 19a. Noting that the definition was of little use, the Fifth Circuit turned to the case law. *Id.* After citing the language in *United States v. Bestfoods*, 524 U.S. 51, 66 (1998), the Fifth Circuit stated that operator liability attaches only if there is a nexus between the alleged operator's control and the hazardous waste in the facility. *Id.* at 19a-20a. The court went on to state that the "totality of the circumstances" concerning a contractor's involvement must be considered in determining "operator" liability, *id.* at 20a, rather than focusing on the most relevant facts (*e.g.* the Engineering Contract, which sets forth that G&M was hired to assist clean up of the LCCC rather than operate the facility). Nonetheless, in the Fifth Circuit's view, disputed issues of material facts precluded summary judgment. *Id.* at 20a-21a.

With regard to "arranger" liability, the Fifth Circuit stated that "liability attaches when one has 'arranged for disposal' of hazardous substances." *Id.* at 21a. As mentioned earlier, G&M argued in its Answering Brief that intent is required to "arrange" and the District Court found that G&M could not be held responsible because G&M never intended to arrange for, manage or transport Conoco's hazardous waste. *See supra* pp. 5-6. Nonetheless, the Fifth Circuit did not address the intent issue. Rather, the court determined that there were material facts in dispute regarding whether, and how, the hazardous waste was moved by G&M. App., *infra*, 21a. Consequently, the court reversed and remanded without providing any guidance as to whether Conoco would be required to prove that G&M intended to dispose of hazardous substances.

G&M petitioned the Fifth Circuit for panel rehearing. The court denied G&M's petition on January 11, 2001. *Id.* at 48a-49a.

REASONS FOR GRANTING THE PETITION

CERCLA is an important statute creating a broad and pervasive strict liability scheme. Incorrect and inconsistent judicial interpretation affecting the scope of liability and limitations may have profound consequences to litigants nationwide.

In 1980, Congress enacted CERCLA in response to the serious environmental and health risks posed by industrial pollution. *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998) (citing *Exxon Corp. v. Hunt*, 475 U.S. 355, 358-59 (1986)). "As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Id.* (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994)). CERCLA also authorizes suits by private parties to obtain contribution or recover costs expended in cleaning up hazardous waste sites. *See, e.g., ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 355 (2d Cir. 1997); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997).

While CERCLA's social and economic impact may have been significant even at its inception, it is apparent that CERCLA's effect has become tantamount over the years. At one time it was estimated that between 130,000 and 380,000 sites were potential candidates for CERCLA government-initiated response action. *See United States v.*

A&N Cleaners and Launderers, Inc., 854 F. Supp. 229, 236 (S.D.N.Y. 1994) (citing Evan Bogart Westerfield, *When Less is More: A Significant Threat Threshold for CERCLA Liability*, 60 U. CHI. L. REV. 697, 697 n. 4 (1993)). Along with the large number of sites comes a large number of litigants. A 1996 House Report cites EPA statistics that demonstrate that there are between 80,000 and 100,000 parties involved in the CERCLA liability system. H.R. Rep. No. 104-861, at 70 (1996). Moreover, estimates of costs are staggering. Estimates of CERCLA cleanup costs range in the several hundreds of billions of dollars with an estimate as high as $750 billion. *See A & N Cleaners*, 854 F. Supp. at 236 (citing John T. Ronan III, *A Clean Sweep on Cleanup*, THE RECORDER, Sept. 30, 1992, at 10; OFFICE OF TECHNOLOGY ASSESSMENT, ASSESSING CONTRACTOR USE IN SUPERFUND, *reprinted in* 1 CHEMICAL WASTE LITIG. REP. 715 (1989)).

Thus, CERCLA carries significant weight from an economic perspective and it affects a broad base of the American public. To ensure that CERCLA does not overreach (or fail to reach) its intended bounds, courts should give thoughtful consideration to issues relating to liability. This case offers the Supreme Court an opportunity to give guidance and resolve divergent decisions of the United States Courts of Appeals with regard to three such issues.

In particular, the Supreme Court should resolve the proper application of the CERCLA Section 113(g)(2) statute of limitations. *See* 42 U.S.C. § 9613(g)(2). By creating a rule of law that erroneously takes a narrow view of what activities trigger the statute of limitations, the Fifth Circuit severely limited the statute's intended effect. Prompt review by this Court would ensure that the

uncertainty engendered by the Fifth Circuit's ruling does not lead lower courts astray. Moreover, this Court's review would provide notice to potential CERCLA litigants that might otherwise delay filing claims in reliance upon the Fifth Circuit's narrow interpretation of the statute of limitations.

In addition, this case provides the Court with an opportunity to properly delimit the scope of the "operator" provision of CERCLA Section 107(a)(1) and (2) to ensure that environmental contractors, like G&M, are not discouraged from participating in response activities because of the threat of strict liability under CERCLA for the consequences of pre-existing contamination. *See* 42 U.S.C. § 9607(a)(1) & (2). While the environmental contractor's role does not fit within the ordinary meaning of "operator" as interpreted by this Court in *United States v. Bestfoods*, 524 U.S. 51 (1998), the Fifth Circuit's broad view of that term threatens to undermine the remedial goals of Congress by holding environmental contractors strictly liable for the results of contaminating activities that occurred years before the contractor's involvement at the site.

Likewise, this Court may put an end to the misapplication of the "arranger" liability provision of CERCLA Section 107(a)(3). *See* 42 U.S.C. § 9607(a)(3). Over the years, some courts have twisted the phrase "arranged for disposal" to include unintentional disposal. *See, e.g., United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1089 (8th Cir. 1995) (stating that "arranger" liability does not require specific intent); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1512 (11th Cir. 1996). This faulty interpretation invites CERCLA plaintiffs to name defendants that are beyond the scope of the CERCLA

liability scheme as intended by Congress. *See, e.g., Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) (CERCLA plaintiff argued that the supplier of useful product that hired a transporter to deliver that product had "arranged for disposal" when the useful product accidentally spilled on the ground during unloading from the transporter's truck). This Court may now properly limit "arranger" liability to those who had an intent to dispose. Such a ruling would help ensure that CERCLA liability is not extended beyond Congress's original intent.

I. In Contrast to the Holdings of the Other Circuits, the Fifth Circuit Incorrectly Focused Only on Activities Conducted During G&M's Response Action Involvement Rather Than Looking at the Totality of On-Site Response Activity When Determining the Response Action That Triggered the CERCLA Section 113(g)(2) Statute of Limitations.

The statute of limitations set forth at Section 113(g)(2) of CERCLA begins to run upon the triggering of one of two events. Section 113(g)(2) of CERCLA states:

> An initial action for recovery of the costs referred to in section 9607 of this title must be commenced -
> (A) for a removal action, within 3 years after completion of the removal action . . . and;
> (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action . . . .

42 U.S.C. § 9613(g)(2). Faced with the issue of whether to apply the three-year statute of limitations of Section

113(g)(2)(A) or the six-year statute of limitations of Section 113(g)(2)(B), the Fifth Circuit correctly turned to the issue of whether the response activities at the site were "removal" or "remedial." App., *infra*, 12a. However, in making its determination, the court did not consider all the relevant response activities. Instead, the court only considered response activities that were contemporaneous with G&M's involvement with the site.[5] *Id.* at 16a.

As a result, the Fifth Circuit ignored all response activities except those that were conducted when G&M performed well installation work, which ended in July 1985. The court stated that "the crucial response activity is that which occurred during G&M's involvement" and that "no permanent remedy was in place . . . when G&M constructed and installed the wells." *Id.* Given the Fifth Circuit's temporal limitation, the court focused on G&M's installation of monitoring wells as the relevant response activity and concluded that "[e]ven if the replacements for these wells are integral to the long-term remediation of the site, that does not mean that their initial placement cannot be categorized as removal." *Id.* at 17a. Recognizing that "removal" actions are "short-term" response activities and that the installation of monitoring wells for the purpose of initial site investigation falls within that category, the Fifth Circuit incorrectly concluded that the activities relevant to triggering the statute of limitations were "removal" in nature. *Id.* at 15a-17a. The Fifth Circuit's failure to consider response activities conducted after July 1985 erroneously resulted in the court ignoring Conoco's remedial "tank farm program" which began in

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[5] As indicated earlier, the Fifth Circuit appeared to disregard G&M's limited involvement after the installation of the wells.

approximately 1988, *id.* at 38a and 46a, and lasted for over ten years.

The Fifth Circuit's application of the statute of limitations is illogical and is inconsistent with decisions from other federal circuits and district courts. The court of appeals failed to explain why the time period during G&M's involvement is the only time period that could include response activities relevant to determining when the statute of limitations is triggered. The language of the CERCLA Section 113(g)(2) statute of limitations provides no basis for the Fifth Circuit's interpretation. The statute does not specify who must perform the response action; nor does the statute specify when the response action must be performed in relation to the defendant's on-site activities. Nonetheless, the Fifth Circuit concluded that the only activities that could trigger the statute of limitations are those actions that occurred during G&M's involvement.

G&M is aware of no other federal court decision holding that the only response activities that trigger the statute of limitations must take place during the time-frame for which the defendant was involved with the site. In fact, other courts have reached the opposite conclusion. For example, the Seventh Circuit determined that a CERCLA action was barred by the statute of limitations without giving any consideration to whether the triggering response activity occurred when the defendant was or was not involved with the site. *See United States v. Navistar Int'l Transp. Corp.*, 152 F.3d 702 (7th Cir. 1998). In *Navistar*, the Seventh Circuit decided whether the government's CERCLA action against Navistar, a party associated with contamination at the site, was timely. *Id.* at 706-07. According to the court, Navistar demonstrated that the site owner began construction of a clay cap at the site more than

six years before the government filed its CERCLA action. *Id.* at 713. Because the *site owner's* response activity constituted "on site construction of the remedial action," the court held that Section 113(g)(2) barred the action. *Id.* However, unlike the Fifth Circuit in the present case, the *Navistar* court did not even consider when Navistar's involvement with the site took place. Rather than focusing on the defendant's involvement, the Seventh Circuit looked at the totality of response activity at the site as a whole and determined that the site owner's activity constituted the remedial action that triggered the statute of limitations.

The Fifth Circuit's overly narrow view of response activities that may trigger the statute of limitations also conflicts with the Sixth Circuit's analysis in *Kelly v. E.I. DuPont De Nemours and Co.*, 17 F.3d 836 (6th Cir. 1994). In *Kelly*, the state of Michigan sued E.I. DuPont De Nemours and Co. ("DuPont") for response costs necessary to clean up a landfill site owned by a third party. DuPont had disposed of industrial waste in the landfill over a ten-year period beginning in 1955. It was not until the 1980s that the Michigan Department of Natural Resources ("MDNR") hired contractors to perform a removal action. In 1986, one phase of the removal action was complete (the "1986 Phase"). Additional removal activities were performed at least through 1988.

In 1990, MDNR sued DuPont under CERCLA to recover the cost of the clean up efforts. Based on the three-year statute of limitations of Section 113(g)(2)(A), DuPont asserted that MDNR's claim for recovery of costs associated with the 1986 Phase was time barred. The Sixth Circuit disagreed, reasoning that the 1986 Phase removal activities were part of the same removal action that encompassed later removal activities. *See id.* at 843-44.

Implicitly, the Sixth Circuit rejected any notion that the time period during DuPont's involvement was the only time period that could include response activities relevant to determining when the statute of limitations was triggered. In determining that MDNR's CERCLA action was not time barred, the Sixth Circuit looked at response activities that occurred after the defendant's (DuPont's) involvement. *See id.* To apply the Fifth Circuit's requirement — that the only response actions relevant in determining when the statute of limitations triggers are response actions that occurred during the defendant's involvement with the site — would lead to an absurd result in *Kelly* because *no response activities at all* occurred during the defendant's involvement. Thus, the statute of limitations would never run because there would never be a triggering response action.

By limiting its focus to activities that occurred during G&M's involvement, the Fifth Circuit's analysis results in the anomalous conclusion that the statute of limitations is *never* triggered on Conoco's claim. If the only events that are relevant occurred during G&M's involvement, and that time-frame included neither the commencement of remedial action nor the conclusion of removal action, then the triggers of Section 113(g)(2) and (3) are each eliminated -- leaving no possible trigger at all. Accordingly, under the Fifth Circuit's holding, nothing is to prevent Conoco from filing a lawsuit now or at anytime in the future against G&M for the claims alleged in the underlying suit. The fact that Congress provided a statute of limitations in Section 113 indicates that Congress did not intend to create a cause of action without temporal limitation.

It is apparent that the Fifth Circuit struggled to apply the statute of limitations in this unusual case involving an environmental contractor hired to work on a site that was already contaminated. However, it does not follow that because G&M was involved in the response activities, that the only response activities relevant in determining when the statute of limitations is triggered are those that occurred during G&M's involvement. Certainly, response activities after G&M's involvement could be relevant in triggering the statute of limitations, just as activities occurring after the defendant's involvement were relevant in *Navistar* and *Kelly*.

In particular, undisputed evidence shows that the tank farm program, which was initiated in approximately 1988, about three years after G&M finished its work, was aimed at permanently remediating the site. App., *infra*, 38a and 46a. The program lasted over ten years and recovered nine million gallons of water containing 16 thousand pounds of contaminants, yet the Fifth Circuit failed even to consider the program as a relevant response activity for purposes of determining the triggering of the statute of limitations. A proper analysis of the tank farm program would have revealed that it was a long-term action that was intended to permanently clean up the groundwater. Consequently, the tank farm program was "remedial" in nature and, therefore, the six-year statute of limitations of Section 113(g)(2)(B) was triggered in approximately 1988. Conoco's CERCLA counterclaim was filed in 1997, at least three years after the 1994 deadline.

The Fifth Circuit's newly found temporal limitation concerning the removal or remedial action in Section 113(g)(2) introduces new uncertainty into the issue of timelines under CERCLA. Now, lower courts looking to

the Fifth Circuit for precedent must apply an additional court-imposed rule, not expressed in the Section 113(g)(2), when determining when the statute of limitations is triggered. Such a requirement undermines the very purpose of a statute of limitations — to provide certainty regarding when a claim becomes stale.

II. This Court Should Make Clear that "Operator" Liability Does Not Extend to Environmental Contractors that, Like G&M, Participated in Response Activities at an Already-Contaminated Site at the Direction of the Site Owner.

In its motion for summary judgment, G&M argued that it was not an operator because, as a contractor engaged to provide environmental services, it did not have the authority to implement any of its recommendations without approval from Conoco. The District Court agreed with G&M because it found that G&M's contractual role was limited to investigation and assistance in Conoco's clean up activities. App., *infra*, 45a. However, the Fifth Circuit found the District Court's conclusion premature, on the grounds that material issues of fact existed with regard to the nature and extent G&M's control over its activities at the LCCC. *Id.* at 20a-21a. By remanding for factual findings regarding control, the Fifth Circuit failed to recognize that extending "operator" liability to environmental contractors does violence to the meaning of "operator" as interpreted by this Court and distorts the liability scheme envisioned by Congress.

CERCLA Section 107 lists four classes of persons that can be held liable for clean-up costs associated with a CERCLA site: site "owners," "operators," "arrangers," and

"transporters." CERCLA Section 107(a)(1) and (2) establish liability for:

> (1) the . . . operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance . . . operated any facility at which such hazardous substances were disposed of. . . .

42 U.S.C. § 9607(a). CERCLA Section 101(20)(A) defines "operator" in a circular manner, as "any person . . . operating . . . a facility." *See* 42 U.S.C. § 9601(20)(A); *see also United States v. Bestfoods*, 524 U.S. 51, 55 (1998) (recognizing that the definition is a tautology).

In *Bestfoods*, this Court recently provided guidance to flesh out the "ordinary and natural meaning" of "operator:"

> [A]n operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Id. at 66.

In the present case, it is clear that the Engineering Contract did not cause G&M to become an "operator" of the LCCC within the "ordinary and natural meaning" of the term as interpreted by this Court in *Bestfoods*. G&M merely acted as a contractor engaged by Conoco to participate in remedial investigation. G&M's contractually-prescribed role was limited to mere design and placement of wells; the contract did not allow G&M to "manage, direct, or conduct operations" of the facility. In short, G&M was hired to help remediate the facility rather than operate it.

The District Court recognized the limitations of G&M's contractual role, concluding that "G&M was merely an environmental contractor employed to investigate and assist in constructing a facility for remedying contamination already in the soils." App., *infra*, 45a. Because the purpose and extent of G&M's participation is discernable from the Engineering Contract, no additional facts were necessary for the District Court to conclude that G&M was not an operator as a matter of law.

The District Court is not alone in its rationale. In *Blasland, Bouck & Lee, Inc. v. City of North Miami*, 96 F. Supp.2d 1375 (S.D. Fla. 2000), the owner of a contaminated site sued an environmental engineering firm that had provided services in connection with remediating the site. Bringing claims similar to Conoco's allegations against G&M, the owner claimed that the engineering firm was an operator as a result of its remediation work. After analyzing the contractor's liability in terms of this Court's "operator" discussion in *Bestfoods*, the court concluded that "engaging in clean-up activities at a facility does not qualify as the type of 'operation' CERCLA contemplates."

Id. at 1379. Consequently, the court held that the engineering firm was not a CERCLA operator.

In contrast to the sound reasoning of *Blasland* and the District Court in this case, other courts have adopted an analysis mirroring the Fifth Circuit's approach. *See, e.g., K.C. 1986 Ltd. Partnership v. Reade Mfg.*, 33 F. Supp.2d 1143, 1148 (W.D. Mo. 1998); *Ganton Technologies, Inc. v. Quadion Corp.* 834 F. Supp. 1018, 1022 (N.D. Ill. 1993). These courts have erroneously stretched the concept of "operator" to include contractors engaged in clean up of contaminated sites.

Intervention by this Court is critical to restore the scope of "operator" liability to effectuate the intent of Congress while protecting CERCLA's central objective: the prompt remediation of contaminated sites. *See In re Jensen*, 995 F.2d 925, 927 (9th Cir. 1993). Pinning the liability for contamination upon environmental contractors as "operators" only defeats CERCLA's mandate. Such an interpretation would have a chilling effect on the environmental remediation industry causing further delay in the remediation process.

III. This Court Should Decide Whether Intent Is an Element of "Arranger" Liability Because the Fifth Circuit Failed to Resolve the Issue Despite Its Dispositive Importance on Remand and the Clear Conflict of Circuit Court Decisions on the Issue.

The third of the four classes of persons that can be held liable under CERCLA Section 107(a) consist of those who "arranged for disposal" of hazardous substances,

commonly known as "arrangers." CERCLA Section 107(a)(3) establishes "arranger" liability for:

> [A]ny person who by contract, agreement, or otherwise *arranged for disposal* or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . .

42 U.S.C. § 9607(a) (emphasis added).

In the present case, Conoco alleged that G&M was an "arranger" because the Engineering Contract was an "arrangement" and that G&M's performance under the contract allegedly resulted in "disposal" of hazardous substances. According to Conoco, "disposal" occurred when contaminants already in the groundwater leaked deeper into the ground through the monitoring wells that G&M designed pursuant to the Engineering Contract. It is beyond dispute that the Engineering Contract does not contemplate any intent to cause contaminants to migrate deeper into the ground. Accordingly, whether Section 107(a)(3) requires "intent to dispose" is a dispositive issue with respect to Conoco's "arranger" claim.

A. The Courts of Appeals Have Issued Conflicting Rulings on Whether CERCLA Requires "Intent to Dispose" as an Element of "Arranger" Liability.

The issue of whether intent to enter into an arrangement for disposal is a requisite element of "arranger" liability is an exceptionally controversial issue among the Courts of Appeals. The Sixth and Seventh Circuits have held that there is an intent or "state of mind" requirement implicit in the "arranged for disposal" language of CERCLA Section 107(a)(3). *See United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231-32 (6th Cir. 1996); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993); *see also Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840, 845 (6th Cir. 1999); *RSR Corp. v. Avanti Dev., Inc.*, 68 F. Supp.2d 1037, 1043-44 (S.D. Ind. 1999); *Struhar v. City of Cleveland*, 7 F. Supp.2d 948, 952 (N.D. Ohio 1998). Likewise, the District of Utah has interpreted Section 107(a)(3) to require intent. *See Ekotech Site PRP Comm. v. Self*, 932 F. Supp. 1328, 1336 (D. Utah 1996). On the other hand, the Eighth and Eleventh Circuits have expressly stated that specific intent to dispose is not a requirement for "arranger" liability. *See United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1089 (8th Cir. 1995); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1512 (11th Cir. 1996).[6] Several district courts have also stated that specific intent to dispose is not required. *See United States v. Vertac Chem. Corp.*, 966 F.

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[6] Although *Redwing* does not condition arranger liability on intent to dispose, it includes intent among the factors bearing on whether there is a "nexus" between the defendant and the disposal sufficient to result in arranger liability. *See Redwing*, 94 F.3d at 1512.

Supp. 1491, 1501 (E.D. Ark. 1997); *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1138-40 (N.D. Fla. 1994).

Because several circuits have addressed the issue of whether intent is a prerequisite to "arranger" liability, the key points for both positions are fully developed and sharpened for resolution for this Court. Now that the issue has matured, this case offers this Court the opportunity to put an end to the troubling inconsistency in this area of CERCLA. A clear ruling by the Court requiring intent as a necessary element of "arranger" liability would correctly delimit the scope of "arranger" liability, leading to a more manageable and fair liability scheme that coincides with Congressional intent.

Such a ruling would eliminate arguments such as the one in *Amcast*, where a CERCLA plaintiff claimed that the supplier of a useful chemical that hired a transporter to deliver the product had "arranged for disposal" when the chemical accidentally spilled on the ground during the unloading from the transporter's truck. *See Amcast*, 2 F.2d at 751. Clearly, labeling the chemical supplier as an "arranger" in that context is a stretch of Section 107(a)(3). For these reasons, it is imperative that this Court end the irreconcilable split among the circuits with regard to "arranger" liability.

B. The Fifth Circuit's Failure to Address the Issue of Whether Intent Is an Element of "Arranger" Liability, in Light of the Fact That the District Court Based Its Holding on Lack of Intent Leaves the District Court, and Other Courts, With Insufficient Direction.

The District Court concluded that "[t]he evidence clearly establishes that G&M did not operate, *arrange for*, or transport hazardous substances." App., *infra*, 45a (emphasis added). The District Court reasoned that "the problem of migration of [Conoco's] hazardous waste cannot be laid at the feet of G&M, because it was never the *intent* of G&M or [Conoco] that G&M arrange for, manage or transport [Conoco's] hazardous waste." *Id.* at 47a (emphasis added). Accordingly, the District Court granted summary judgment based, in part, on Conoco's failure to show that G&M intended to dispose of hazardous substances. *Id.*

Despite the fact that the District Court expressly grounded its arranger liability ruling on Conoco's failure to show any "intent to dispose," the Fifth Circuit seemed to avoid the issue even as it reversed and remanded. The court first focused on disposal and stated that the movement of hazardous substances around an already-contaminated site could constitute disposal. *Id.* at 21a. The court then identified a factual dispute regarding if and how the hazardous substances were moved and whether installation of the wells caused contaminant migration. *Id.* Based on these factual disputes, the Fifth Circuit rejected the District Court's grant of summary judgment, *id.*, even though the disputed issues had no bearing on whether G&M had the intent to dispose.

As a result, the Fifth Circuit's analysis of "arranger" liability fails to provide the District Court with the necessary guidance on whether Conoco must prove that G&M intended to dispose of hazardous substances. The Fifth Circuit's "arranger" analysis continued by citing *Burlington Northern Railroad Co. v. Woods Industries, Inc.*, 815 F. Supp. 1384, 1392 (E.D. Wash. 1993), for the proposition that if facts revealed that the defendant gave instructions to a third party which caused the dispersal of waste, the defendant would be subject to "arranger" liability. *Id.* at 21a-22a. The court instructed the District Court that there must be a nexus, presumably between the purported "arranger" and the disposal, before liability can attach. *Id.* at 22a. The court concluded that on remand, "the totality of the circumstances must take into consideration each of these factors." *Id.* It is unclear to what factors the Fifth Circuit was referring.

The Fifth Circuit's failure to give guidance to the District Court regarding intent provides this Court with the opportunity to resolve the inter-circuit split while encouraging a decisive result in this case which avoids relitigation of the "intent" issue and possible future appeals. The District Court specifically held that G&M could not be liable for Conoco's contaminant migration problem because it lacked the intent to "arrange for, manage or transport Conoco/Condea's hazardous waste." *Id.* at 47a. The Engineering Services Contract clearly does not contemplate an "intent to dispose" of hazardous substances down the well. Disputed facts identified by the Fifth Circuit, regarding if and how hazardous waste was moved, do not bear on whether G&M had the intent to dispose. Accordingly, the Fifth Circuit should have ruled in favor of G&M as a matter of law or at least given the District Court

guidance on whether intent was an element of "arranger" liability.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 11, 2001

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GERAGHTY AND MILLER, INC., Plaintiff-Counter Defendant-Appellee,

v.

CONOCO INC.; CONDEA VISTA CHEMICAL COMPANY, Defendants-Counter Claimants-Appellants.

No. 99-20020

Appeal from the United States District Court for the Southern District of Texas

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Filed Dec. 14, 2000
Rehearing Denied Jan. 11, 2001

Before: POLITZ, GIBSON* and HIGGINBOTHAM, Circuit Judges.

Opinion by Judge GIBSON.

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* Circuit Judge of the Eighth Circuit, sitting by designation.

Conoco Inc. and Condea Vista Chemical Company appeal the district court's order granting summary judgment to Geraghty and Miller, Inc. ("G&M") in this environmental clean-up action. This case includes a claim under CERCLA, the Comprehensive Environmental Response, Compensation and Liability Act, as well as state common law claims. We affirm in part and, because a genuine issue exists as to certain material facts, we reverse in part.

The parties do agree on a sufficient number of background facts to set the stage. This dispute arises out of an environmental clean-up at the Lake Charles Chemical Complex in Westlake, Louisiana. The Complex has been owned and operated by Conoco or Vista since 1961, and in 1968 Conoco began managing ethylene dichloride at the facility. Ethylene dichloride, a feedstock in the production of vinyl chloride monomer, is a "hazardous substance" as CERCLA defines that term. As a result of historic releases and migration, ethylene dichloride contamination occurred in soil from the surface to at least twenty-five feet down and in shallow groundwater zones.

The Louisiana Department of Environmental Quality required Conoco to investigate and address the ethylene dichloride contamination under state groundwater protection laws and regulations and federal and state solid waste laws and regulations. It also required Conoco to put in place a groundwater monitoring and assessment program pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1994), and its corresponding regulations and their Louisiana state counterparts. As is often the case in such clean-ups, the process was set to take place in stages. Conoco and G&M entered into a contract on March 12, 1985 under which G&M was to furnish all required services for "Ground-

Water Quality Assessment, Phase 2" at the Vinyl Chloride Monomer Plant Area and Waste Water Treatment Area ("the Plant") of the Complex. Vista was a third-party beneficiary under the contract.

Under the contract, G&M was to assess possible contamination beneath several suspected source areas at the Complex. It was to perform that assessment by 1) preparing design specifications for the installation of groundwater monitor wells and piezometers used to monitor possible groundwater contamination at the Complex; 2) installing the monitor wells and piezometers; and 3) sampling the monitor wells following installation. G&M completed the installation of fifty monitor wells on July 23, 1985.

For approximately the following year, G&M sampled the monitor wells and interpreted the monitoring data to determine the nature and extent of contamination. G&M submitted quarterly reports to Conoco/Vista to advise them of the results.

Sometime before May 1988, Conoco/Vista began to suspect potentially serious technical and physical deficiencies in three of the monitor wells G&M had installed. They were concerned that such deficiencies were aggravating the contamination. Conoco/Vista received approval from the Louisiana Department in May 1988 to plug and abandon those wells. Conoco/Vista allege that they uncovered physical evidence that the three wells were not installed according to the contract specifications, and they sent a series of letters to G&M concerning the deficiencies. In December 1989, Conoco/Vista plugged and abandoned a fourth well, and they allege that this well also was not installed according to specifications.

These experiences caused Conoco/Vista to question the soundness of the remaining wells and other parts of the groundwater monitoring system. Conoco/Vista and G&M discussed who was responsible for the costs associated with these allegedly defective wells, but they were unable to resolve the issue. On August 27, 1990, the parties entered into the Groundwater Wells Interim Agreement. The Interim Agreement called for the parties to agree upon criteria for determining whether a given monitor well was "suspect" or "not suspect" of being improperly installed, and to agree upon criteria for determining whether a given well was "properly" or "not properly" installed. Once the criteria were in place, the parties would apply them to each of the wells to determine which needed to be removed and who would bear the costs. That never occurred, however, because the parties never agreed on the criteria.

The parties entered into the Interim Agreement to allocate responsibility between them for the costs of plugging and abandoning additional wells that they were to agree upon as being "suspect." G&M maintains that there was no other purpose for entering into the deal, but Conoco/Vista insist that the Interim Agreement gave the parties time to investigate the integrity of the wells while not allowing the statute of limitations to run on any defect claims that remained unresolved. Conoco/Vista assert that G&M received, as consideration for the deal, a release from approximately $250,000 in monitor well plugging and abandonment costs.

Conoco/Vista retained other environmental consulting firms to continue the groundwater assessment program. Upon the recommendation of one such consultant, Conoco/Vista plugged and abandoned the remaining G&M-installed wells in 1993 and replaced them.

In April 1993, Conoco/Vista filed suit against G&M in Texas state court, alleging state common law causes of action. During the course of that litigation, the Texas Court of Appeals held that the language in the Interim Agreement concerning a possible tolling and extension of the statute of limitations was ambiguous as a matter of law.

In April 1997, with the state court lawsuit still pending, G&M filed the instant CERCLA action, seeking reimbursement from Conoco/Vista for G&M's past and future response costs. Conoco/Vista filed a counterclaim two months later, also seeking relief under sections 107 and 113 of CERCLA. Meanwhile, the state court case was trifurcated for trial, with the first phase focused on whether the Interim Agreement tolled the statutes of limitations. Trial began in phase one in November 1997 and, while the jury was deliberating, Conoco/Vista took a voluntary non-suit and the state court judge dismissed the lawsuit.

After the district court granted partial summary judgment to G&M, Conoco/Vista amended their counterclaim to omit their section 107 CERCLA claim and to add the state common law claims. Ultimately, G&M voluntarily dismissed its complaint, leaving only Conoco/Vista's CERCLA section 113 and state common law counterclaims at issue.

Less than a month before this case was to begin trial, G&M unsuccessfully sought leave to file a partial summary judgment motion on the basis that Conoco/Vista's CERCLA counterclaim was time-barred. When the parties appeared for trial on the scheduled date, the district court discussed the case with counsel and suspended the start of the trial. Less than a week later, the district court granted summary judgment to G&M on several grounds including that the CERCLA claim was time-barred.

The district court held that Conoco/Vista's state common law claims were barred by Texas statutes of limitations; that G&M was not liable for contribution because it was not a "covered person" under CERCLA as an operator, arranger, or transporter of hazardous materials; and that the six-year limitation period of 42 U.S.C. § 9613(g)(2) (1994) barred Conoco/Vista's CERCLA claim. We address each of these issues, along with Conoco/Vista's complaint that the district court entered summary judgment without giving them notice and an opportunity to respond.

I.

The district court entered summary judgment for G&M without providing the notice required by Rule 56(c) of the Federal Rules of Civil Procedure. Conoco/Vista argue that they were unfairly prejudiced because they did not have notice that the district court was contemplating entering a dispositive order, nor did they have an opportunity to respond or to present evidence. We review under the harmless error standard. *See Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 504 (5th Cir. 1994).

By the time this case reached its trial date, G&M had filed three motions for partial summary judgment and had attempted to file a fourth. The district court had granted G&M's motion that Conoco/Vista be declared "covered persons" under CERCLA, had denied G&M's motion that it be declared not to be a "covered person", and had yet to rule on G&M's motion seeking summary judgment on Conoco/Vista's state common law claims. Conoco/Vista had filed briefs and affidavits in opposition to those three motions. G&M had sought leave to file a motion that the remaining CERCLA claim be declared barred by the statute of limitations, but the district court denied leave because

the motion was untimely. Thus, all of the issues except the CERCLA statute of limitations had been fully briefed by the time the case was ready for trial.

When the district court entered its order granting complete summary judgment to G&M, the parties expected to be in the midst of a non-jury trial. When they arrived for trial on the appointed day, the district court announced the view that it would be beneficial to take some time to narrow the issues so that the evidence could be streamlined. The court indicated that it would review the file and directed the parties to return the following day to begin trial. After its review, the district court concluded that all of the claims were amenable to judgment as a matter of law.

While the district court erred by not observing the notice requirements of Rule 56(c), this procedural error was later cured. After the district court entered its summary judgment order, Conoco/Vista filed a motion for rehearing/new trial along with a brief on the CERCLA statute of limitations issue. In their motion, Conoco/Vista pointed out what they believed to be disputed material facts and offered citations to the record for those facts. They did not, however, submit any additional affidavits or documentary evidence.

Conoco/Vista pointed out that they had not received notice and an opportunity to respond to the CERCLA statute of limitations issue, as the court had denied G&M leave to file its partial summary judgment motion on that issue. To support their argument, Conoco/Vista attached an affidavit and an exhibit to their separate brief on the CERCLA statute of limitations issue.

The district court considered both the motion and the brief and determined that summary judgment was still

appropriate. The district court thus revisited all of the issues in the summary judgment order. Conoco/Vista ultimately had an opportunity to be heard on all of the issues,[1] and the district court's post-summary judgment consideration and ruling cured any procedural defect. *See Barney v. IRS*, 618 F.2d 1268, 1271 n.8 (8th Cir. 1980); *United States v. Shelly's Riverside Heights Lot X*, 859 F. Supp. 150, 151 (M.D. Pa. 1994).

District courts are empowered to enter summary judgment sua sponte. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Although we disagree with some of the district court's legal conclusions, its consideration of summary judgment in the first instance without notice and hearing was harmless error.

II.

We turn now to the district court's rulings on the substantive legal issues. We review the grant of summary judgment de novo. *See Uniroyal Chemical Co. v. Deltech Corp.*, 160 F.3d 238, 241 (5th Cir. 1998). G&M bears the burden of showing the absence of evidence to support Conoco/Vista's case, and Conoco/Vista must set forth specific facts demonstrating a genuine issue for trial. We view the facts in the light most favorable to Conoco/Vista and draw all reasonable inferences in their favor. If Conoco/Vista set forth specific facts essential to their claims, a genuine issue of material fact will preclude

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[1] Conoco/Vista admit in their brief on appeal that they had such an opportunity: "The evidence Conoco and Vista would have presented to the court in response to the summary judgment motion was filed in connection with their motion for rehearing."

summary judgment. *See Coleman v. Houston Indep. School Dist.*, 113 F.3d 528, 533 (5th Cir. 1997).

A.

CERCLA contains different statutes of limitations for section 107(a) cost-recovery actions and for section 113 contribution actions. *See* 42 U.S.C. § 9613(g)(2)(B) (1994) (six-year statute for initial action for recovery of remedial costs under section 107(a), triggered by beginning of physical on-site construction); 42 U.S.C. § 9613(g)(3) (three-year period for contribution action under section 113, with three alternative triggering events: a prior judgment, an administrative order, or a judicially approved settlement). Whether a party is seeking recovery under section 107(a) or contribution under section 113 does not always determine the applicable statute of limitations. In cases such as this one where a party seeks contribution but none of the triggering events has occurred, Congress did not designate the statute of limitations.

The district court determined that Conoco/Vista's CERCLA claim is governed and barred by the six-year statute of limitations. The court characterized this as an initial action for the recovery of remediation costs and found that Conoco/Vista initiated remedial on-site construction in 1987. According to the district court's application, the statute of limitations expired in 1993. Because Conoco/Vista did not file their CERCLA counterclaim until 1997, the district court found it time-barred.

Conoco/Vista argue that their CERCLA contribution claim is governed by the three-year limitations period, as 42 U.S.C. § 9613(g)(3) is the only section that on its face applies to contribution actions. Conoco/Vista insist

that their counterclaim was timely because it was filed before any of the triggering events contained in section 113(g)(3) occurred. Under their theory, it is indeterminate when the limitations period would ever expire.

In the alternative, Conoco/Vista assert that, even if section 113(g)(2) applies, the statute of limitations has not run or material facts are in dispute as to whether it has run. They further assert that G&M waived the affirmative defense of section 113(g)(2) by not properly or timely pleading it.

B.

The circuits are split on the appropriate statute of limitations to apply in a case that is neither a recovery claim under section 107 nor derivative of or responsive to any other formalized dispute. There are three basic approaches to the issue, *see City of Merced v. R.A. Fields*, 997 F. Supp. 1326, 1334 (E.D. Cal. 1998) (collecting cases), but our court has not yet adopted any of the three. Under the first approach, we would find that the plain language of section 113(g)(3) establishes no statute of limitations for this case. Under the second, we would use the six-year statute of limitations in section 113(g)(2), for reasons explained below. Under the third, we would use the three-year statute of limitations in section 113(g)(3) and import another triggering event from federal common law. *See id.*

We conclude that the Tenth Circuit's reasoning in favor of the second approach in *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997), is the most persuasive. In *Sun Co.*, the Tenth Circuit analyzes the statutory framework and applies it in a practical way. Its

rationale begins with the explanation that while section 113(f)[2] is the vehicle for bringing a contribution action, it does not create a new cause of action or create any new liabilities. Rather, it is a mechanism for apportioning costs that are recoverable under section 107. *See id.* at 1191 (citing cases). In other words, a section 113 contribution action is a claim for collection of the costs referred to in section 107. By definition, the Tenth Circuit reasons, a contribution action is merely one type of cost-recovery action. *See id.* at 1192. If there has been no prior section 107 cost-recovery action, a contribution action becomes an "initial action for recovery of the costs referred to in section 9607 of this title," and must be brought "within 6 years after initiation of physical on-site construction of the remedial action." *Id.* (quoting 42 U.S.C. § 9613(g)(2)(B)).

We hold that the statute of limitations found in CERCLA section 113(g)(2) applies to initial contribution actions such as this. If we were to accept Conoco/Vista's argument and apply section 113(g)(3), the statute of limitations would be indefinite because a triggering event

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2 Section 113(f) of CERCLA provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1) (1994).

might never occur. This result would undermine the certainty that statutes of limitations are designed to further.

Contrary to Conoco/Vista's argument, G&M did assert this affirmative defense in a sufficiently timely manner. G&M included the statute of limitations as an affirmative defense in its first responsive pleading, thereby putting Conoco/Vista on notice of the issue. Even though G&M initially relied on the limitations period of section 113(g)(3), a mere assertion of the defense satisfies the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. *See Daingerfield Island Protective Soc'y v. Babbitt*, 309 U.S. App. D.C. 186, 40 F.3d 442, 444-45 (D.C. Cir. 1994). Moreover, the pretrial order recited G&M's assertion that the CERCLA claim was barred by the statute of limitations, with a precise citation to the statute. Conoco/Vista were not surprised or prejudiced by the district court's consideration of the issue. *See Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 855-56 (5th Cir. 1983); *Hargett v. Valley Fed. Sav. Bank*, 60 F.3d 754, 763 (11th Cir. 1995).

C.

Our review of the CERCLA statute of limitations issue does not end with our determination that section 113(g)(2) applies. We must next decide whether Conoco/Vista's response actions at the Complex are properly categorized as "remedial" or "removal" to determine whether the counterclaim is timely. *See* 42 U.S.C. § 9613(g)(2) (under subsection (A), an action for recovery of costs of a "removal action" must be filed "within 3 years after completion of the removal action"; under subsection (B), an action to recover costs of a "remedial action" must be filed "within 6 years after

initiation of physical on-site construction of the remedial action").

The district court determined that Conoco/Vista were engaged in ongoing remediation at the Complex and that physical on-site construction began in 1987. It also determined that Conoco/Vista were currently involved in removal and remediation activities. Conoco/Vista argue that their counterclaim seeks recovery of costs for what can only be characterized as removal of the contamination. Not surprisingly, G&M agrees with the district court's determinations that remediation activities were in place and that they began in 1987.

Congress provided definitions for "removal"[3] and "remedial action,"[4] and the classification of the activity is

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3 CERCLA defines "remove" or "removal" as:

> the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act.

determined as a matter of law. *See Advanced Micro Devices, Inc. v. National Semiconductor Corp.*, 38 F. Supp. 2d 802, 809 (N.D. Cal. 1999); *United States v. Vertac*

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42 U.S.C. § 9601(23).

[4] CERCLA defines "remedy" or "remedial action" as:

> those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

42 U.S.C. § 9601(24).

Chem. Corp., 33 F. Supp. 2d 769, 782 (E.D. Ark. 1998). In reviewing the undisputed facts and the parties' arguments concerning how we should apply the relevant law to those facts, it strikes us that confusion often results because the industry use of "remediation" is not synonymous with CERCLA's definition of "remedial." Moreover, the CERCLA definitions are expansive enough that certain activities may well be covered by both. This is a question of law with some complexity. "Elements of either response action may overlap and semantics often obscure the actual nature of the cleanup performed." *Public Serv. Co. v. Gates Rubber Co.*, 175 F.3d 1177, 1182 (10th Cir. 1999).

Although the cases on this issue tend to be highly fact-specific, certain principles emerge. We have often noted that removal actions generally are immediate or interim responses, and remedial actions generally are permanent responses. *See, e.g., OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997). In addition, "Congress intended that the term 'removal action' be given a broad interpretation." *See, e.g., Kelley v. E.I. DuPont de Nemours and Co.*, 17 F.3d 836, 843 (6th Cir. 1994).

With these principles in mind, we conclude that the response action in this case is properly classified as removal. The groundwater quality assessment program that Conoco/Vista instituted by order of the Louisiana Department was conducted in three phases. The first phase was one of assessment only, to confirm the presence of contaminants and understand the groundwater flow and other underground conditions. The second phase--and the only one that G&M participated in--was a more detailed assessment to determine the extent of contaminants in the first fifty feet of soil and to investigate water quality below that level. The third phase included establishing a

groundwater monitoring and remediation program and conducting a feasibility study of remedial alternatives. In the specifications and contract documents, G&M described the third phase as "a comprehensive rate-and-extent assessment of migrating ground-water contaminants, and if necessary, a determination of the appropriate remedial actions necessary to abate contaminant movement."

The operative facts are that G&M installed monitor wells and piezometers at the Complex. In describing the scope of the work it was to perform under the contract, G&M stated that it had designed the monitor wells and piezometers to collect data but also "so that they can be converted to recovery wells if needed." At the time, G&M apparently did not consider its work to include any remediation efforts, and only considered it a possibility that its work would be part of a recovery effort.

Although Conoco/Vista eventually removed and replaced these wells, they were part of a pilot corrective action program that Conoco/Vista instituted in response to the Louisiana Department order. Their ultimate use is irrelevant, however, because the crucial response activity is that which occurred during G&M's involvement. Thus, even if the wells had remained in place and their use converted to an unquestionably remedial purpose, that would not change the classification for statute of limitations purposes. *See Louisiana v. Braselman Corp.*, 78 F. Supp. 2d 543, 549 (E.D. La. 1999) (monitoring wells were used during investigation and design phases of project; their continued use during remedial action phase did not convert the pilot study to remedial action); *Advanced Micro Devices*, 38 F. Supp. 2d at 813 ("The fact that the extraction activities ultimately did not turn out to be short-term, because they were implemented in the final remedy four years later, cannot now be considered in hindsight.").

The undisputed facts show that no permanent remedy was in place for the Complex when G&M constructed and installed the wells. Even if the wells performed some function that falls within the definition of remedial activity, that does not automatically exclude them from classification as removal activities. There can be some overlap between the two. *See General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1419 (8th Cir. 1990) (although CERCLA lists excavation as an example of remedial activity, excavation can be and under facts of case is a removal activity).

Although G&M suggests that a clean-up program of this magnitude and duration must be categorized as remedial, we are not persuaded. The record shows that the Louisiana Department had yet to issue its final decision, and only that decision will define the ultimate remedial strategy for the Complex. Even if the replacements for these wells are integral to the long-term remediation of the site, that does not mean that their initial placement cannot be categorized as removal. *See General Elec. Co.*, 920 F.2d at 1419 n.4; *Advanced Micro Devices*, 38 F. Supp. 2d at 813; *EPA v. TMG Enters., Inc.*, 979 F. Supp. 1110, 1130 (W.D. Ky. 1997).

We hold that the activities at issue are properly categorized as removal activities, and the statute of limitations does not bar Conoco/Vista's counterclaim for CERCLA contribution.

III.

Having determined that Conoco/Vista's CERCLA counterclaim was timely, we must next decide whether G&M is a "covered person" under CERCLA and therefore

amenable to a contribution claim. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994).[5] The statute defines a "covered person" as:

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. . . .

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[5] To prevail in a contribution action, Conoco/Vista must show 1) G&M is a "covered person" under CERCLA section 107(a); 2) the Complex is a "facility" under CERCLA; 3) a "release" or "threatened release" of a "hazardous substance" occurred at the facility; and 4) the release or threatened release caused Conoco/Vista to incur response costs. *See* 3550 *Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1358 (9th Cir. 1990). The last three elements are not at issue in this appeal.

The district court held that G&M is not an operator, arranger, or transporter of hazardous substances.[6] The court described G&M as "merely an environmental contractor employed to investigate and assist in constructing a facility for remedying contamination already in the soils."

We agree with the district court concerning G&M's status as a transporter, but we conclude that the disputed material facts preclude the entry of summary judgment declaring that G&M is not an operator or an arranger.

A.

Although the first category of "covered persons" refers to "the owner and operator" of a facility, those words are not redundant. In some circumstances the operator may not be the owner. In addition, a facility may have more than one operator.

While we normally begin our analysis with the statutory language, we do not obtain much assistance from the CERCLA definition of a facility's "operator" as "any person . . . operating" the facility. 42 U.S.C. § 9601 (20)(A)(ii) (1994). We look then to see how case law has supplied a definition.

> [U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. . . . [An] operator must manage, direct, or conduct operations specifically

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[6] Conoco/Vista did not allege that G&M is the owner of the Complex.

> related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

United States v. Bestfoods, 524 U.S. 51, 66-67, 141 L. Ed. 2d 43, 118 S. Ct. 1876 (1998). For one to be considered an operator, then, there must be some nexus between that person's or entity's control and the hazardous waste contained in the facility. This nexus has been described as a "well-settled rule" that "'operator' liability. . . only attaches if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment." *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992); *see also CPC Int'l, Inc. v. Aerojet-General Corp.*, 731 F. Supp. 783, 788 (W.D. Mich. 1989) ("The most commonly adopted yardstick for determining whether a party is an owner-operator under CERCLA is the degree of control that party is able to exert over the activity causing the pollution.").

A court must decide whether a contractor is an operator after considering the totality of the circumstances concerning its involvement at the site. *See K.C. 1986 Ltd. Partnership v. Reade Mfg.*, 33 F. Supp. 2d 820, 834 (W.D. Mo. 1998). While Conoco/Vista point out that G&M had a great deal of control over the placement, design and installation of the wells, including the selection and supervision of the subcontractor who performed the actual installation, G&M portrays its role as one of lending advice and expertise to the project that was ultimately controlled by Conoco/Vista. However, it is more than the portrayal of the roles that is in dispute. The parties also disagree on material facts concerning Conoco/Vista's technical expertise, their supervision of the work, and the parties'

relative authority at the work-site. Because the facts concerning the degree of G&M's control over the monitor wells are in dispute, summary judgment declaring that G&M was not an operator was premature.

B.

Arranger liability attaches under CERCLA when one has "arranged for disposal" of hazardous substances. *See* 42 U.S.C. § 9607(a)(3). Because CERCLA does not define "arranged for," courts sometimes look to the definition and interpretation of "disposal" for assistance in deciding if one is an arranger. While we have not provided a bright-line test for determining when one is an "arranger," we have looked at "disposal" in the context of the entire phrase. In *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988), we rejected a narrow interpretation of "disposal," thereby leaving open the possibility that one who moves hazardous waste intra-site can be held liable as an arranger.[7]

The parties dispute if and how the hazardous waste was moved by G&M at the Complex, including whether installation of the wells by G&M's subcontractor caused migration of the ethylene dichloride. Thus, the district court should not have entered summary judgment on this issue. *See Burlington N. R.R. Co. v. Wood Indus., Inc.*, 815 F.

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[7] Tanglewood also declined to answer another argument G&M raises, namely that arranger liability under CERCLA may not reach beyond waste generators that enlist third parties as agents. When asked to decide which specific businesses and activities are covered by CERCLA, we declined to do so in the context of a Rule 12(b)(6) motion. 849 F.2d at 1573-74. We have not been asked to articulate a list in this case.

Supp. 1384, 1392 (E.D. Wash. 1993) (even though lessee didn't bring hazardous waste to the site, if facts revealed that its instructions to a third party caused waste to be dispersed across the site it would be subject to arranger liability).

"Arranger" is another CERCLA term that is to be given a liberal interpretation. *See, e.g., United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989). Our approach in Tanglewood is consistent with that interpretation. We are mindful, however, that just as a nexus must exist for operator liability to attach, there must also be a nexus that allows one to be labeled an arranger. One court has described that nexus as "the *obligation* to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal." *General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) (emphasis in original). On remand, therefore, the totality of the circumstances must take into consideration each of these factors.

C.

The district court correctly decided that G&M is not subject to liability as a "transporter" of hazardous waste. CERCLA defines "transportation" as "the movement of a hazardous substance by any mode. . . ." 42 U.S.C. § 9601(26) (1994). Under CERCLA section 107(a)(4), however, liability is imposed on a person who transports hazardous substances to a disposal or treatment facility or to "sites selected by such person." Even if G&M's conduct resulted in the unintended migration of ethylene dichloride, there is no evidence that G&M moved the ethylene dichloride to another facility or site. We affirm the entry of summary judgment on this issue.

IV.

We turn now to Conoco's state common law counterclaims of breach of contract, fraud, breach of warranty, and negligence. The district court entered summary judgment on all, finding them barred by the applicable statutes of limitations. Conoco/Vista correctly point out that G&M bears the burden of proof on such an affirmative defense. *See Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 753 (Tex. App. 1995, writ denied). They assert that their claims were timely by virtue of the relation back doctrine and the Texas discovery rule and that the parties agreed to toll the statutes as part of the Interim Agreement.

A.

The Interim Agreement, signed by the parties in 1990, is not a model of clarity. It recites that its purpose is to achieve accord and satisfaction of past disputes and to suspend potential future disputes about paying expenses associated with the groundwater assessment program. The Agreement called for the parties to reach further accord within 90 days on the criteria for determining whether a well had been properly or improperly installed. The parties agreed to pay all of their own expenses to date, with Conoco/Vista agreeing to waive reimbursement of what it now says was $250,000 in expenses. The final relevant portion of the Agreement is in paragraph H, which adopted the ten-year "statute of limitations" contained in Tex. Civ. Prac. & Rem. Code Ann. §§ 16.008 (West Supp. 2000) and

16.009 (West 1986)[8] and applied it to any unresolved claim for damages.

The parties make much of their disagreement as to the purpose of the Interim Agreement. Conoco/Vista insist that paragraph H reflects the parties' agreement to toll and extend the statute of limitations, that its inclusion was an integral part of the deal, and that G&M in effect received $250,000 as consideration for the extension.[9] G&M denies that such a purpose existed. This disagreement is irrelevant to the basis for the summary judgment order, however, because the district court found the document unenforceable as an "agreement to enter into an agreement."

Under Texas law, parties may agree on certain contractual terms, understanding them to be an agreement, while leaving other terms open for future negotiation. *See Scott v. Ingle Bros. Pac., Inc.*, 489 S.W.2d 554, 555 (Tex. 1972).[10] Whether we agree with the district court that the

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8 The statutes are in fact statutes of repose rather than statutes of limitations. They permit a person to bring suit for damages against architects, engineers and others who design and construct improvements to real property or equipment attached to real property no later than ten years after the improvements are completed.

9 Elsewhere in their brief, Conoco/Vista argue that the statutes of repose cited in paragraph H do not apply because G&M is not an engineering or construction firm. Conoco/Vista cannot have it both ways, and we disregard that argument.

10 We recognize that this is an incomplete statement of Texas law. There are two essential elements that must be satisfied for this kind of contract to be enforceable. First, the contract must be sufficiently definite in its terms so that a court can understand the promises made. Second, all material terms of the contract must be agreed upon. *See*

Interim Agreement is an "agreement to agree" ultimately makes no difference. In the state court lawsuit--involving the same parties and exactly the same state common law claims--the trial court entered summary judgment in favor of G&M on the sole ground that the claims were barred by the applicable statutes of limitations. Conoco/Vista appealed, arguing that a question of fact existed as to whether paragraph H of the Interim Agreement tolled and extended the statutes of limitations. The Texas Court of Appeals reversed the summary judgment order, holding that paragraph H is ambiguous as a matter of law and that its interpretation is a fact issue.

This is a matter of state substantive law where we will defer to the Texas Court of Appeals' decision. *See United States v. Johnson*, 160 F.3d 1061, 1063 (5th Cir. 1998). We are required to apply the doctrine of stare decisis to the Texas appellate court decision on this issue, particularly because it was issued in a case involving the same parties and the same issues. *See Peregoy v. Amoco Prod. Co.*, 742 F. Supp. 372, 374 (E.D. Tex. 1990), aff'd, 929 F.2d 196 (5th Cir. 1991).

Accepting the decision that the Interim Agreement dated August 27, 1990 is ambiguous, it is uncertain whether it tolls the statute of limitations. We must reverse the summary judgment order on this issue, then, unless we can determine as a matter of law that the limitations period expired before that date.[11]

T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 221 (Tex. 1992).

[11] The district court made no finding as to when the Interim Agreement was terminated. Under paragraph H, termination triggers the running of the statute of limitations.

B.

We return, then, to the fundamental question of when the statute of limitations expired for each of the state law claims. Conoco/Vista never answer that question directly. Rather, they assert various reasons why their amended counterclaim was filed within the requisite time without saying when that time expired. Texas law provides the answer: the statute of limitations for breach of contract, breach of warranty, and fraud is four years,[12] and for negligence it is two years.[13]

Conoco/Vista argue that the discovery rule applies to each of these actions, so that the limitations period began running when they learned of the injury rather than when the injury occurred. Under Texas law, the discovery rule (an exception to the general rule) applies to breach of contract[14] and fraud,[15] but it does not apply to breach of

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12 *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (West Supp. 2000)(fraud); *Enterprise-Laredo Assocs. v. Hachar's, Inc.*, 839 S.W.2d 822, 837 (Tex. App. 1992, writ denied) (breach of contract); *S-C Indus. v. American Hydroponics Sys., Inc.*, 468 F.2d 852, 855-56 (5th Cir. 1972) (non-UCC breach of warranty subject to four-year limitations in Tex. Rev. Civ. Stat. Ann. art. 5527, repealed and now contained in § 16.004).

13 *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (West Supp. 2000).

14 *See* Enterprise-Laredo Assocs, 839 S.W.2d at 837.

15 *See Quinn v. Press*, 135 Tex. 60, 140 S.W.2d 438, 440 (Tex. 1940).

warranty[16] or negligent design and construction[17] causes of action.

We can apply the four- and two-year statutes of limitations to the breach of warranty and negligence claims, as it is undisputed that G&M completed its work in 1985. The statutes expired in 1989 and 1987, respectively, and none of Conoco/Vista's arguments serve to change that conclusion.[18]

With respect to the breach of contract and fraud claims, G&M bears the burden of proof as to the discovery

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16 *See Martinez v. Humble Sand & Gravel, Inc.*, 940 S.W.2d 139, 147 (Tex. App. 1996), aff'd sub nom. *Childs v. Haussecker*, 974 S.W.2d 31 (Tex. 1998) (discovery rule does not apply to breach of warranty claims under Tex. Bus. & Comm. Code Ann. § 2.725 relating to sale of goods). Conoco/Vista allege that G&M breached an express warranty, but they cite only cases regarding breach of an implied warranty in support of their argument that the discovery rule applies. Even if those cases were relevant, they are no longer good law. *See Clark v. DeLaval Separator Corp.*, 639 F.2d 1320, 1325 n.2 (5th Cir. 1981).

17 *See Olson v. Passero*, 402 S.W.2d 953, 954 (Tex. App. 1966, writ ref'd n.r.e.).

18 We find no merit to Conoco/Vista's argument that the Texas relation back doctrine provides relief. Conoco/Vista amended their counterclaim in December 1997. That amendment could not relate back to anything earlier than G&M's April 1997 complaint. The pendency of the state court lawsuit before April 1997 did not toll the statute of limitations for the federal court action. *See Cunningham v. Fox*, 879 S.W.2d 210, 212 (Tex. App. 1994, writ denied) ("A dismissal is the equivalent of a suit never having been filed. . . . Therefore, if a suit is dismissed, the statute of limitations is not tolled for any new pleading filed."); *Armstrong v. Ablon*, 686 S.W.2d 194, 196 (Tex. App. 1984, no writ) ("Where a plaintiff voluntarily abandons his suit, the statute of limitations is not interrupted during the period when the suit was pending.").

rule. In order for G&M to prevail on its affirmative defenses to the breach of contract and fraud claims in a summary judgment motion, it must prove when the claims accrued and must negate the discovery rule by proving as a matter of law that there is no genuine issue of fact about when Conoco/Vista discovered or should have discovered the nature of the injury. *See Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990). We conclude that G&M has not met this burden, as the facts are disputed concerning the date on which Conoco/Vista did or should have discovered their injury.

Certainly Conoco/Vista cannot argue for a discovery date of later than April 1993, because that is when they filed their state court lawsuit. In their motion to reconsider the district court's order, Conoco/Vista asserted that the window for them to have discovered their injury is from May 1988 to sometime in 1992, when they initiated the plugging and abandonment of the remaining wells. G&M argues that Conoco/Vista discovered the injury in a series of alternative ways from 1988 through 1993.

If we were reviewing this without the possible influence of the Interim Agreement on the tolling issue, we would accept Conoco/Vista's admission that they discovered their injury no later than 1992. We would then apply the four-year statute of limitations for breach of contract and fraud and conclude that their 1997 counterclaim was not timely. However, as we noted earlier, we must reverse the summary judgment order unless we can conclude as a matter of law that the statute of limitations expired before the Interim Agreement was signed on August 27, 1990. Because we may not resolve the disputed facts concerning when the injury was or should have been discovered, we leave this determination for the district court.

V.

We reverse the district court's judgment and order with respect to its conclusions that Conoco/Vista's CERCLA counterclaim is barred by the statute of limitations, that G&M cannot be found liable in a CERCLA contribution claim as an operator or an arranger, and that Conoco/Vista's state law claims for breach of contract and fraud are time-barred. We affirm the district court's judgment and order insofar as it dismisses the CERCLA claim seeking to hold G&M liable as a transporter and Conoco/Vista's counterclaim for breach of warranty and negligence. We remand for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GERAGHTY AND MILLER, INC., Plaintiff-Counter Defendant-Appellee,

v.

CONOCO INC.; CONDEA VISTA CHEMICAL COMPANY, Defendants-Counter Claimants-Appellants.

No. 99-20020

Appeal from the United States District Court for the Southern District of Texas, Houston

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Filed Jan. 11, 2001

ON PETITION FOR REHEARING

Before: POLITZ, GIBSON* and HIGGINBOTHAM, Circuit Judges.

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* Circuit Judge of the Eighth Circuit, sitting by designation.

PER CURIAM:

IT IS SO ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Patrick Higginbotham
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GERAGHTY AND MILLER, INC., Plaintiff,

v.

CONOCO INC., ET AL., Defendants

No. CIV. A. 97-1119

Filed Oct. 9, 1998

Opinion by Judge HOYT, District Judge.

MEMORANDUM OPINION

I. INTRODUCTION

This case involves issues of state common law and federal law. Federal jurisdiction is premised on 42 U.S.C. § 9601 *et. seq.*; the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). *See* 42 U.S.C. § 9613(b).

This suit was initiated by Geraghty & Miller, Inc. ("G&M") against Conoco, Inc. and Condea Vista Company ("Conoco/Condea") on or about April 3, 1997. However, discussion about G&M's claims has become unnecessary because G&M has since dismissed its suit against Conoco/Condea. *See* Inst. # 68 Order of Dismissal. However, because Conoco/Condea filed a counterclaim against G&M, the suit continues. In its counterclaim, Conoco/Condea seeks contribution from G&M for its share of recovery costs under CERCLA. Conoco/Condea also seeks recovery for breach of contract, fraud and negligence under state law. Thus, the claims of Conoco/Condea and the defenses of G&M are before the Court for trial.

II. PARTIES GENERAL CONTENTIONS

To Conoco/Condea's federal and state claims, G&M asserts that because it was not the operator of the Conoco/Condea facility, nor arranger or transporter of the contaminated groundwater it, G&M, is not liable, as a matter of law. Also G&M asserts that it is exempt from CERCLA liability. Regarding the state law claims of breach of contract, fraud and negligence, G&M asserts that the state Statute of Limitations, the Statute of Repose, and lack of evidence suggesting any misrepresentation of material fact upon which Conoco/Condea relied, bars further

litigation. It must be further noted that G&M also relies upon the statutes of limitations as a further bar to Conoco/Condea's CERCLA claims. The Court is of the opinion that sufficient facts are admitted by the parties that the Court determines that part, if not all, of Conoco/Condea's claims may be resolved as a matter of law.

III. ADMISSIONS OF FACT[1]

1. Conoco and Vista are Delaware corporations with their principal places of business in Houston.

2. G&M is a Delaware corporation doing business in Texas.

3. Conoco or Vista has owned and operated the Lake Charles Chemical Complex ("LCCC") from 1961 to the present. Beginning in 1968, Conoco began managing, among other chemical compounds, ethylene dichloride ("EDC") at the LCCC. The management of these compounds have continued through today. Historic releases caused EDC contamination of the surface soils and near surface (shallow) groundwater zones. These historic releases caused some migration of contamination down to at least twenty-five feet below the surface of the LCCC, and occurred during the time the LCCC was owned and operated by Conoco or Vista. Conoco and/or Vista are obligated to investigate and address the LCCC contamination issues as required by the state of Louisiana under state groundwater protection laws and regulations

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[1] The Joint Pretrial Order on file in this case contains the parties stipulation of facts. They have been restated here.

and federal and state solid waste laws and regulations. In 1987, Conoco and Vista began recovering or pumping EDC contaminated groundwater from under the Vinyl Chloride Monomer ("VCM") tank farm area of the LCCC. This pilot recovery system consisted primarily of pumping groundwater and treating it prior to discharging it to surface water and was installed in connection with the feasibility study work. The pilot groundwater recovery system which began operating in the VCM tank farm area of the LCCC in 1987 is believed to be currently in operation.

4. Conoco and G&M executed [a] Contract on March 12, 1985, [for design, engineering and construction services pertaining to the monitoring and recovery of EDC contaminates]. Vista was a third-party beneficiary under the Contract. Under the terms of the Contract, G&M agreed to furnish to Conoco all required services for a "Ground-Water Quality Assessment, Phase 2" at the "VCM" Plant Area and Waste Water Treatment Area of the LCCC at Westlake, Louisiana. A groundwater monitoring and assessment program was a requirement imposed upon Conoco pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, et seq., the regulations promulgated thereto, as well as counterpart regulations and requirements of the state of Louisiana.

5. The work to be performed by G&M under the Contract was an assessment of possible contamination beneath several suspected source areas at the LCCC, which included the following services: (1) the preparation of design specifications for the installation of groundwater monitor wells and piezometers used to monitor possible groundwater contamination at the LCCC; (2) installation of the monitoring wells and piezometers; and (3) initial sampling of the monitoring wells following installation. G&M completed the installation of the monitoring wells on

July 23, 1985. Thereafter, for approximately one year, G&M continued to sample the monitoring wells and submit quarterly reports to Conoco and Vista, which included interpretation of the monitoring data to determine the nature and extent of contamination. Fifty (50) groundwater monitoring wells and piezometers were installed by G&M under the Contract.

6. In 1988, Conoco and Vista documented their allegations that they had begun to discover potentially serious technical and physical deficiencies in three of the monitor wells installed by G&M pursuant to the Contract. Conoco and Vista allege that their concerns about the groundwater beneath the LCCC (which the wells were supposed to monitor) became so acute that three wells, VB-1, VB-2, and VC-2, were plugged and abandoned with approval from the LDEQ in May 1988. While plugging these three wells, Conoco and Vista allege they uncovered physical evidence that those three wells were not installed according to the Contract specifications. A fourth well, VD-1, was plugged and abandoned by Conoco and Vista in December 1989. While plugging this fourth well, Conoco and Vista allege they uncovered physical evidence that this fourth well was not installed according to the Contract specifications. The experiences with these four wells allegedly gave Conoco and Vista reason to be concerned about the remaining 46 wells installed under the Contract as well as other parts of the groundwater monitoring system which the Contract was designed to provide.

7. G&M had a consultant monitor the plug and abandonment procedures for the well known as VD-1.

8. On August 27, 1990, Conoco/Condea and G&M entered into the Groundwater Wells Interim Agreement ("Interim Agreement"). The parties agree that

one of the purposes of the Interim Agreement was to allocate the costs of plugging and abandoning "suspect" wells among the parties. The parties do not agree on other purposes of the Interim Agreement.

9. G&M was paid in full for its work and services under the Contract.

10. G&M held itself out to Conoco as being knowledgeable and skillful in the practice concerning groundwater well monitoring system design and installation.

11. Conoco/Condea made demand upon G&M to pay for the damages claimed to arise from the breach of contract claims.

12. Construction of the groundwater monitoring wells installed by G&M was represented to be substantially completed on July 23, 1985.

13. The Conoco/Condea state law causes of action asserted in this case are substantially the same state law causes of action asserted in the state court action.

14. When Conoco/Condea signed the Interim Agreement on August 27, 1990, they had reason to suspect there were defects in many of the G&M wells.

15. The state court action was filed on April 16, 1993.

16. The original counterclaim in this case was filed on June 24, 1997.

17. The state court action was dismissed on November 14, 1997.

IV. OTHER UNDISPUTED FACTS

The pleadings and documents presented in this case show that Conoco/Condea commenced its remediation program in late 1986, early 1987. The program was commenced by "selecting an area of contamination and installing a remediation system to recover [harmful] contaminants . . ." "The . . . tank farm area [was selected] as the location for [Conoco/Condea's] pilot remediation system. Also during this time period, the primary activity conducted by Conoco/Condea was an investigation of the rate and extent of contamination.

It is also undisputed that Conoco/Condea's original federal counterclaim, sought only a CERCLA liability determination, contribution under CERCLA and a declaratory judgment that G&M was responsible for further response costs that might be incurred by Conoco/Condea. (*See* Defendant's Original Answer and Counterclaim, Inst. # 5). Therefore, while the pleadings assert claims arising out of the same nucleus of facts, as a related state lawsuit, no state law cause(s) of action were asserted in the counterclaim. Conoco/Condea's state law claims of breach of contract and negligence were simultaneously pending in the 165th Judicial District Court of Harris County. However, on November 12, 1997, this Court entered its Memorandum Order (Inst. # 19) concerning Conoco/Condea's counterclaim. In that document, the Court held that Conoco/Condea was the owner and operator of the LCCC facility as contemplated and defined by federal law. *See* 42 U.S.C. § 9601(20)(A).

The Court also considered Conoco/Condea's admissions in state court on this matter and held that Conoco/Condea are "covered persons' under section 107 of CERCLA." The Court then permitted Conoco/Condea 20-days from the issuance of its Order for Conoco/Condea to replead its counterclaim, if any it had. Within 20-days, Conoco/Condea asserted the CERCLA and state law claims previously identified herein.

In the meantime, the related state court action was dismissed on November 14, 1997, shortly after this Court dismissed Conoco/Condea's CERCLA counterclaim. Therefore, from November 14, 1997, to December 23, 1997, Conoco/Condea had no cause of action officially before any Court.[2]

An examination of the state court pleadings, the original petitions (filed in both the 234th and 165th District Courts) and all amended pleadings, filed in the 165th District Court reveals claims of breach of contract, breach of warranty, and negligence. On October 27, 1997, after the empaneling of a jury and at the close of all evidence, Conoco/Condea filed its Notice of Non-Suit, which was granted by Order of Dismissal on November 14, 1997. Thus, it is undisputed that Conoco/Condea's state suit was dismissed before it filed its amended counterclaim. (Between November 14 and December 2, 1997, no state suit or federal counterclaim was pending.)

V. CONTENTIONS AND DISCUSSION

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[2] The Court recognizes that Conoco/Condea filed its motion and First Amended Counterclaim on December 2, 1997 (Inst. # 22). However, the Order granting leave was not entered under [sic] December 23, 1997.

The Court turns now to Conoco/Condea's counterclaim and G&M's defenses. The parties agree that the determination of the question of whether the "discovery rule" applies to Conoco/Condea's case, is a question of law. A discussion concerning this rule is appropriate because G&M contends that the four-year and two-year Statutes of Limitations bar Conoco/Condea's state law claims.

A. The Statutes of Limitations and State Law Claims

Conoco/Condea contends that G&M is guilty of breach of contract, negligence, fraud and breach of warranty. It is undisputed that the contract that is the subject of this dispute was executed on March 12, 1985. It is also undisputed that no suit was filed by Conoco/Condea until April 16, 1993. Thus, in the ordinary cause of proceedings, the contract, negligence, fraud and breach of warranty claims are barred by March 12, 1989. *See* Civ. Prac. & Rem. Code §§ 1603 and 1604 (Vernon's 1986). The facts are undisputed and show that the design and construction performed by G&M were completed in July of 1985, therefore, the claims are time barred.

Conoco/Condea argues, however, that the claims are not barred because of the applicability of the "discovery rule" and the intervention of a "Ground Water Wells Interim Agreement" ("Interim Agreement") executed by the parties on August 27, 1990. The Court will address these contentions in turn.

1. The Discovery Rule Application

According to Conoco/Condea's argument, the discovery rule "provides that the limitations period [does]

not begin to run on any of [its] claims until May 1988," citing *Enterprise-Laredo Assoc. v. Hachar's Inc.*, 839 S.W.2d 822, 837 (Tex. App. -San Antonio 1992, writ denied). For purposes of discussion, the Court accepts Conoco/Condea's statement of the time that it discovered the defects as well as its statement of the applicable law. However, as G&M asserts, the discovery rule does not apply to claims for breach of warranty. *See Trinity River Authority v. URS Consultants*, 889 S.W.2d 259 (Tex. 1994). Therefore, Conoco/Condea's breach of warranty claims, first raised on December 2, 1997, are not saved by the discovery rule. As well, the discovery rule does not save Conoco/Condea's remaining state law claims. Even assuming that Conoco/Condea only discovered G&M's contractual failings in 1988, Conoco/Condea was required to file a suit at that time.[3] Conoco/Condea argues, nevertheless, that the 1990 Interim Agreement extends or tolls the running of the various statutes of limitations. The Court will review the terms of the Interim Agreement for construction purposes.

2. The Interim Agreement

On August 27, 1990, Conoco/Condea and G&M entered into an Interim Agreement, designed to be an "accord and satisfaction of past disputes and suspending potential future disputes concerning the parties' respective responsibilities for the payment of certain expenses. . ." *See* Interim Agreement (Ex. B-2 to G&M Motion for Partial Summary Judgment. Inst. # 35) However, the Interim

---

3 At the time that the parties entered into the Interim Agreement, the time within which Conoco/Condea could have filed suit for negligence and fraud had already passed. The first three wells were plugged by May of 1988.

Agreement specifically states that it is not designed to resolve any dispute or claim for damages that is being resolved by the Well Assessment and Remediation provision." *See* Interim Agreement p. 2(H). The term "Well Assessment and Remediation" means the naturally agreed-upon activities for the evaluation of ground water monitoring well construction usefulness . . [and] the plugging and abandonment of such wells . . .." Thus, the Court holds that potential claims for damages for breach of contract, fraud, negligence and breach of warranty, are not covered by the Well Assessment and Remediation language. Moreover, the Agreement calls for a criterion to be completed within 60-days in order to effectuate the agreement. *See* Interim Agreement p.1(D). The undisputed evidence shows that no agreement, concerning the criteria, beyond Wells WC-1, WC-2, and WC-3 was reached within the 60-day period. Thus, the Court is of the opinion that the "suspending potential future disputes" language does not toll the statutes of limitations, and for at least two reasons.

First, the Interim Agreement was simply an agreement to enter into an agreement(s). In *T. O. Stanley Boot Co. v. The Bank of El Paso*, 847 S.W.2d 218 (Tex. 1992), the Texas Supreme Court denounced this practice. It states, "Where an essential term [of a contract] is open for future negation, there is no binding contract. *Id.* at 221. As a matter of law, the Interim Agreement is not enforceable as a contract and, therefore, does not suspend the parties duties, responsibilities or liabilities under the 1985 contract. However, even if the Interim Agreement were enforceable as an agreement to enter in an agreement, provision "H" of the Agreement does not extend the statutes of limitations on potential claims.

Second, Conoco/Condea relies on the Statute of Repose for an extension of the statutes of limitations. The

Statute of Repose permits a person to bring a suit for damages against licensed or registered architects, engineers and designers who design and construct improvements to real property or equipment attached to real estate no later than 10-years after the improvements are completed. *See* Tex. Civ. Prac. & Rem. Code §§ 16.008 and 16.009. (Vernon's 1968) Construing the Interim Agreement as a whole, the Court concludes that the parties attempted to extend the statutes of limitations for all potential or future claims to coincide with the 10-year period provided in the Statute of Repose. Even assuming an enforceable agreement, Conoco/Condea's reliance on Provision "H" to extend the statute of limitations to 1997 is flawed. Under the Statute of Repose, Conoco/Condea was required to bring a suit on or before July 23, 1995. Although a suit was commenced in 1993, that suit was abandoned in 1997. After abandoning the 1993 suit, no claim was pending until December 1997. At the time that Conoco/Condea abandoned its state court suit, the time for bringing a suit of any nature had expired. Therefore, for the reasons stated, provision "H" does not alter the results earlier stated.

It is compelling that Conoco/Condea had a trial on its state law claims that concluded in November 1997. After the state law case was submitted to the jury and/or court, Conoco/Condea took a unilateral non-suit before a verdict or judgment could be entered. However, once the Order of Dismissal was entered, no state law claims were pending in any court. G&M asserts that Conoco/Condea could not unilaterally non-suit its case without suffering a dismissal with prejudice. This Court agrees. Case law and the rules of procedure do not permit a non-suit without prejudice where the parties have presented the evidence. *Hyundai Motor v. Alvarado*, 892 S.W.2d 853, 854 (Tex. 1995); *See O'Brien v. Stanzel*, 603 S.W.2d 826, 828 (Tex. 1980); *Baldwin v. Klanke*, 877 S.W.2d 879 (Tex. App. -

Houston [1st Dist.] 1194, no writ); Tex. R. Civ. P. 162 and 163 (Vernon Supp. 1997) Therefore, the Court holds that the causes of action for which non-suit was taken in state court are also barred.

VI. G&M'S CERCLA LIABILITY

The final cause of action asserted by Conoco/Condea against G&M arises under CERCLA. Conoco/Condea's CERCLA claims are asserted under the statute and are limited to contribution under 42 U.S.C. § 9613(f)(1). It is Conoco/Condea's position that G&M is a "covered person" either as an "operator," "arranger" or "transporter" of hazardous substances, within the meaning of CERCLA § 9607. The CERCLA statute limits liability to:

> (1) the owner and operator of . . . a facility,
>
> (2) any person who, at the time of disposal of any hazardous substance, owned or operated any facility . . .
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . .
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . from which there is a release, or a threatened release which causes the incurrence of response costs . . .

See 42 U.S.C. § 9607(a).

It is undisputed, and the Court has previously held, that Conoco/Condea owned and operated the LCCC facility at all times when a release of a hazardous substance occurred. It is also undisputed that G&M was never the owner or operator of the LCCC facility. Thus, Conoco/Condea's success under a § 9613 claim for contribution rests on whether G&M is a "covered person" under § 9607. The evidence clearly establishes that G&M did not operate, arrange for, or transport hazardous substances. G&M was merely an environmental contractor employed to investigate and assist in constructing a facility for remedying contamination already in the soils. Thus, the Court concludes that G&M was not a covered person as intended by CERCLA. G&M also asserts that the statute of limitations bars Conoco/Condea's contribution claim. Concerning this issue, the parties dispute whether the three (3) or six (6) year Statute of Limitations applies. The Court will also address this issue.

A. Is Conoco/Condea's CERCLA Claim Time Barred?

An action for the recovery of costs that is an "initial action" based on remediation must be commenced within six (6) years after initiation of physical on-site construction of the remedial action. 42 U.S.C. § 9613(g)(2). However, the statute provides an exception. The exception provided permits a suit to be brought within three (3) years after the completion of the removal action. The term "removal action" refers to the suit for the "cleanup or removal of released hazardous substances. *See* § 9601 (23). The term "remedial action" means an action taken instead of or in addition to a removal action. *Id.* at (24). Thus, the court concludes that the statute permits the owner or operator of a facility such as the LCCC to bring an initial action either for removal costs and remedial cost "within six (6) years

after initiation of physical on-site construction of the remedial action occurs." *See* § 9613 (g)(2)(B).

In the case at bar, Conoco/Condea initiated remedial on-site construction to remediate the soils and water in 1987-88. In fact, it was G&M that engineered and designed the system of wells for monitoring and recovering EDC contaminates. In 1987, Conoco/Condea retained I.T. Corporation to began construction of the remediation system for remediating the ground water under the LCCC pursuant to a 1984 state inquiry or order served on Conoco/Condea. Therefore, there is undisputed evidence that Conoco/Condea began remediation in 1987. It is also undisputed that remediation continues, even today.

Conoco/Condea is currently involved in removal and remediation. Therefore the statutory language concerning the initiation of a removal action or a remediation action within three (3) years after the completion of a removal action is inapposite to the facts at hand. Conoco/Condea's action to recover costs regarding the removal and remediation of EDC contaminates must have been commenced by 1993. The first occasion that a CERCLA claim was made, however, was the filing of a counterclaim on June 24, 1997, in this suit. Thus, the counterclaim is barred by the six (6) year Statute of Limitations.

Finally, in response to G&M's alternative argument that it is not a responsible party under CERCLA provisions. The Court has addressed the issue, but will expand on that opinion here. The Court is of the opinion that the nature and scope of G&M contract with Conoco/Condea, as presented in this case, does not bring G&M within the ambit of section 9607 as one who disposed of, treated, transported or accepted for transport, a

hazardous substance. Quite clearly, G&M's role was to remedy already apparent CERCLA violations.

Conoco/Condea argues, however, that the construction of the Wells was so poor that G&M exacerbated Conoco/Condea environmental problem. Therefore, they stand ready to quantify the nature and scope of the alleged exacerbation. This argument overlooks the fact that all of the work done by G&M was as agent or contractor for Conoco/Condea, and under Conoco/Condea's supervision. The type and location of the wells drilled were directed by Conoco/Condea and the state of Louisiana. Moreover, other contractors have drilled wells that were not a part of those installed by G&M. Thus, the problem of migration of Conoco/Condea's hazardous waste cannot be laid at the feet of G&M, because it was never the intent of G&M or Conoco/Condea that G&M arrange for, manage or transport Conoco/Condea's hazardous waste.

The Court concludes that summary judgment is appropriate as to all issues raised in Conoco/Condea's counterclaim and, therefore, G&M's motion for summary judgment is Granted. *See* Fed. R. Civ. P. 56(c).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CONOCO INC. and CONDEA VISTA CHEMICAL COMPANY,
Plaintiffs,

v.

GERAGHTY & MILLER, INC., Defendant.

C.A. No. H-97-1119

Filed Dec. 3, 1998

ORDER DENYING PLAINTIFFS' MOTION FOR REHEARING/NEW TRIAL

On the 3rd day of December, 1998, the Court heard the Motion for Rehearing/New Trial filed on the 27th day of October, 1998, by CONOCO INC. and CONDEA VISTA CHEMICAL COMPANY, Plaintiffs, in the above-entitled and numbered cause.

The motion was presented to the Court, and the Court, having duly considered Plaintiffs' Motion for Rehearing/New Trial, together with Plaintiffs' Brief regarding the CERCLA Six-Year Statute of Limitations Issues, GERAGHTY & MILLER, INC.'s Brief Regarding CERCLA Issues, GERAGHTY & MILLER, INC.'s

Response to Plaintiffs' Motion for Rehearing/New Trial, as well as all of the exhibits and attachments submitted with the foregoing, in accordance with *Sewell Plastics, Inc. v. Coca-Cola Co.*, 720 F.Supp. 1196, 1199-1200, 1215 (W.D.N.C. 1989), aff'd in part and remanded in part, 912 F.2d 463 (4th Cir. 1990), *cert. denied*, 498 U.S. 1110, 1111, S.Ct. 1019 (1991), is of the opinion that the Plaintiffs' Motion should be OVERRULED.

IT IS THEREFORE ORDERED that the Plaintiffs' Motion for Rehearing/New Trial in this cause be OVERRULED, and that a new trial in this cause be, and hereby is, DENIED.

SIGNED this 3rd day of December, 1998.

/s/ Kenneth Hoyt
JUDGE PRESIDING

APPENDIX E

RELEVANT STATUTES

The following are relevant provisions of the CERCLA, 42 U.S.C. §§ 9601 to 9675:

42 U.S.C. § 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

* * *

42 U.S.C. § 9613. Civil Proceedings

* * *

(g) Period in which action may be brought

* * *

(2) Actions for recovery of costs

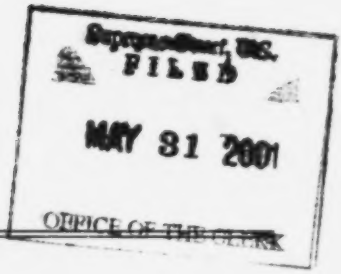
An initial action for recovery of the costs referred to in section 9607 of this title must be commenced —

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a

determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.



No. 00-1582

IN THE
SUPREME COURT OF THE UNITED STATES

ARCADIS GERAGHTY AND MILLER, INC.,

Petitioner,

v.

CONOCO INC.; CONDEA VISTA COMPANY,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court review a decision by the Fifth Circuit that the relevant CERCLA response activities were "removal" rather than "remedial" actions and thus the CERCLA claim was timely filed within the three-year limitations period of § 113(g)(2)(A) of that statute?

2. Should this Court review a decision by the Fifth Circuit that applied CERCLA's "operator" liability provision to the facts of the case, that held that the determinative facts are in dispute, and that left the ultimate determination of these facts to the trial court?

3. Should this Court review a decision by the Fifth Circuit that applied the "totality of the circumstances" test to the issue of CERCLA "arranger" liability, that found that the determinative facts are in dispute, and that left the determination of facts under this test, including the intent of the parties, to the trial court?

PARTIES TO THE PROCEEDING

All of the parties in the United States Court of Appeals for the Fifth Circuit are identified in the caption. All counsel for Respondents, Conoco Inc. and CONDEA Vista Company, are:

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Conoco Inc. has no parent, nor does any publicly held company own 10% or more of the stock of Conoco Inc.

CONDEA Vista Company is wholly owned by Sasol Olefins & Surfactants GmbH, which is owned by Sasol Chemie GmbH & Co. KG, which is owned by a partnership of Sasol Chemical Verwaltungs GmbH and Sasol Chemical Holdings GmbH & Co. KG, which are owned by Sasol Chemical Holdings International (Pty) Limited, which is owned by Sasol International Holdings (Pty) Limited, which is owned by Sasol Limited. The only company which is publicly traded is Sasol Limited, which is traded on the NASDAQ (SASOY).

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Conoco Inc. and CONDEA Vista Company, respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit submitted by Petitioner, ARCADIS Geraghty & Miller, Inc.

STATEMENT

This case involves an independent contractor that exacerbated the environmental conditions it was hired to alleviate and now seeks to avoid CERCLA liability. Geraghty & Miller[1] ("G&M") was hired to investigate possible groundwater contamination at the Lake Charles Chemical Complex ("LCCC"), which has been owned and operated by either Conoco Inc. ("Conoco") or CONDEA Vista Co. ("Vista") from 1961 to the present.[2] In 1985, to comply with the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and related federal and state statutes, Conoco contracted with G&M to explore possible EDC contamination and apply its unique groundwater/environmental experience to design, construct, and sample some 50 groundwater monitoring wells. Vista is an express beneficiary of the written agreement between Conoco and G&M.[3]

Conoco and Vista contend that G&M's improper design and installation of these wells aggravated contamination at the LCCC by causing the vertical and horizontal migration of contaminants. As Petitioner correctly states in its description of the procedural history of the case, Conoco and Vista originally sued G&M in Texas state court based upon state law contract and tort

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1 Geraghty and Miller, Inc., is now ARCADIS Geraghty and Miller, Inc.

2 Conoco and Vista are also referred to collectively as "Respondents."

3 Vista purchased the LCCC from Conoco in 1984.

claims. G&M later brought a federal lawsuit against Conoco and Vista for recovery of investigation costs under CERCLA, and subsequently dropped its claims. Respondents followed with a CERCLA counterclaim against G&M, which is the subject of G&M's Petition for a Writ of Certiorari. G&M has argued at the district court level, the Fifth Circuit level, and now before this Court that the Counterclaim is barred by the applicable statute of limitations. It further claims that it is not liable under CERCLA because it is not an "operator" or an "arranger" under CERCLA.

The Fifth Circuit reversed two partial summary judgments based on these grounds that the District Court granted for G&M. The Fifth Circuit held that the Counterclaim was not barred by the applicable statute of limitations because it classified the response action in this case as "removal" rather than "remedial," and therefore applied the statute of limitations found at CERCLA Section 113(g)(2)(A). Pet.'s App., 12a, 17a.[4] Further, the Fifth Circuit found that G&M failed to establish as a matter of law that it lacked "operator" or "arranger" status, leaving the determination of these issues to the fact finder after applying the appropriate and well-established legal standards. Pet.'s App., 21a-22a. This case involves the application of CERCLA to a case where a contractor causes a new and distinct "release" of contaminants at a site already impacted by contamination, and where response actions are being conducted both before and after the new "release." The Fifth Circuit merely applied well established rules of law to this unusual set of facts; it did not improperly interpret the statute and its holding does not conflict with other case law.

Concerning the statute of limitations issue, Petitioner and Respondents agree with the Fifth Circuit that the applicable

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[4] Respondents incorporate by reference Petitioner's Appendix provided with its Writ Petition and will refer to it as Pet.'s App., followed by the applicable page designations.

statute is CERCLA Section 113(g)(2). *See* Writ Petition, p. 6. Section 113(g) provides for limitations based on two possible types of triggering responsive actions — "removal" actions or "remedial" actions — and then applies different limitations periods accordingly. A three-year limitations period runs from the completion of a "removal" action, and a six-year limitations period (beginning with physical on-site construction) is triggered by a "remedial" action. *See* 42 U.S.C. §§ 113(g)(2)(A) & (B). There is also no dispute with the definitions of "removal" and "remedial" actions applied by the Fifth Circuit. "Removal" actions generally are immediate or interim responses, and "remedial" actions generally are permanent responses. *See, e.g., OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997), *cited at* Pet.'s App., 15a. As G&M readily acknowledges, site investigation activities, including investigation and testing of groundwater, have been uniformly classified as "removal" actions. Writ Petition, p. 8, *citing Green v. Product Mfg. Corp.*, 842 F. Supp. 1321, 1325 n.6 (D. Kan. 1993) (stating that courts agree that investigation and testing of groundwater constitute "removal" actions).

G&M's disagreement with the Fifth Circuit's statute of limitation analysis is not that the wrong legal standard was applied. Instead it argues that certain response actions at the LCCC were improperly characterized as "removal" actions rather than "remedial" actions and that therefore the Court of Appeals applied the wrong statute of limitations.[5] G&M therefore argues that the Fifth Circuit failed to consider all relevant response actions at the LCCC, including response actions taken after G&M was replaced as a contractor at the LCCC, in making its determination. G&M's contention is erroneous. In reality, Peti-

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[5] As determined by the Fifth Circuit, the relevant activities are "removal" actions, and thus the three-year limitations period does not begin to run until "after completion of the removal action." 42 U.S.C. § 9613(g)(2)(A).

tioner seeks relief from how the Court of Appeals applied the law of CERCLA to the unusual case facts. Contrary to G&M's issue articulation, this case does not involve an erroneous interpretation of CERCLA's limitation provisions.

Concerning the issue whether G&M is not an operator or arranger, G&M's contention that it should be exempt from "operator" liability under CERCLA is wrong. CERCLA was designed to protect Conoco and Vista from G&M's actions. In analyzing CERCLA's "operator" liability, the Fifth Circuit looked at the "totality of the circumstances" relevant to determine whether there was "some nexus between [G&M's] control and the hazardous waste contained in the facility." Pet.'s App., 20a-21a. As explained by the Fifth Circuit, these facts would include the level of G&M's control over the groundwater wells under contract. *Id.* These critical facts were in dispute, thus making partial summary judgment in favor of G&M improper. Moreover, there is no blanket exclusion from CERCLA liability for environmental contractors. CERCLA does not require a party to own or fully operate a site such as the LCCC to be a CERCLA operator. Likewise, the Fifth Circuit found that the court must also observe the totality of circumstances in finding whether there is some nexus to be labeled a CERCLA "arranger," and that such a nexus involves "the obligation to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal." Pet.'s App, 21a-22a. Thus, the Fifth Circuit followed prevailing law on the issues of CERCLA "operator" and "arranger" liability.

While the Fifth Circuit based its decision in this case on the controlling case law and the clear language of CERCLA, G&M argues for abandoning that language and precedent and for creating an exemption for certain environmental contractors that is not included in the statute. Since Congress did not envision a blanket exclusion for environmental contractors from CERCLA liability, none should be created by the courts. The Fifth Circuit

correctly reversed the partial summary judgments that were granted in favor of G&M, and its decisions should be upheld.

REASONS FOR DENYING THE PETITION

This case has only minor ramifications for CERCLA jurisprudence and the persons affected by the statute. The Fifth Circuit correctly reversed an improvidently granted summary judgment and remanded this case for trial. The Fifth Circuit's decision is consistent with both the statutory language and case law from other circuits on the rather obscure issues involved here. Those issues are which CERCLA limitations period applies to a contractor that exacerbates a contamination problem it was hired to study and whether CERCLA's purposefully broad definitions should be construed by the courts to protect environmental contractors. Tellingly, neither of the only two court of appeals decisions with which the instant case supposedly conflicts (*Navistar* and *Kelly*) involved environmental contractors, and *Navistar* does not even confront the issue of which CERCLA limitations period applied. G&M's attempt to characterize this case as one involving issues of major importance to persons other than the parties is simply unfounded, and the petition should be denied.

I. The Fifth Circuit Properly Applied CERCLA's Statute of Limitations to the Relevant Response Activities, Including Those Conducted After G&M's Installation of Monitor Wells at the LCCC.

G&M's criticism of the Fifth Circuit's statute of limitations analysis contains two major flaws. First, in a CERCLA action against an environmental contractor that has exacerbated existing chemical plant contamination problems, the **contractor's** actions must necessarily be the focus of a limitations analysis under CERCLA §113(g)(2). Otherwise, unrelated activities at the plant could time bar the claims against the contractor even before the contractor began work. Second, the Fifth Circuit did

not exclude all consideration of post G&M activities as asserted by the Petitioner. Rather, the Court of Appeals evaluated the entirety of the relevant response activities at the LCCC and properly placed G&M's actions as part of the "removal" phase. Even if remedial steps were being taken to address groundwater contamination at another part of the plant by other contractors, those actions should not time bar Conoco's CERCLA claim against G&M for its removal related actions elsewhere.

In its review of the district court's decision that Conoco's and Vista's CERCLA claims are barred by CERCLA's statute of limitations, the Court analyzed whether **"Conoco/Vista's response actions** at the Complex are properly categorized as 'remedial' or 'removal.'" Pet.'s App., 12a (emphasis added). The Court continued its analysis of the complete groundwater quality assessment program activities that Conoco and Vista had conducted, and recognized that this program was coordinated into three phases, including: (1) "one of assessment only," (2) "a more detailed assessment," and finally (3) "establishing a groundwater monitoring and remediation program and conducting a feasibility study of remedial alternatives." *Id.* at 15a. Specifically, these activities included those that were "part of a pilot corrective action program that Conoco/Vista instituted in response to the Louisiana Department order" [i.e., activities including the tank farm program] and activities that were conducted at the site up until the time of suit — thus indicating that no "ultimate remedial strategy" had been defined for the site. *Id.* at 16a-17a. Of these various activities, G&M was involved only in the earlier assessment phases; later, more detailed assessment work including rate and extent investigation and remedial design and testing were completed by other environmental contractors. *See* Pet.'s App., 35a, 38a. The appellate record detailed all of the Conoco/Vista environmental activities at the LCCC.

Therefore, the Fifth Circuit reviewed not just activities conducted by G&M, but all of the response activities that were

part of the record, and concluded that the activities were properly characterized as "removal." The fundamental point is that G&M's work was part of the removal action when placed in the context of the case facts. Although the Court did closely review G&M's activities for its analysis, it did so to characterize properly those activities under CERCLA's limitations scheme. The Court's focus on those actions that are most relevant to whether Conoco's and Vista's CERCLA claims against G&M were timely brought is logical since it was G&M's activities that gave rise to the Conoco/Vista CERCLA claims.[6]

Not only does G&M misinterpret the Fifth Circuit's decision, it incorrectly asserts that the Fifth Circuit's decision conflicts other Circuit Courts of Appeals. Neither case cited by G&M as conflicting involved an on site contractor and one did not even address the issue of remedial vs. removal action.

The facts and issues in the Seventh Circuit's decision in *United States v. Navistar Int'l Transp. Corp.*, 152 F.3d 702 (7th Cir. 1998), and the application of CERCLA in that case are distinct from those before the Fifth Circuit here. *Navistar* involved a government action against off-site generators and haulers (traditional CERCLA "arrangers" or "transporters") to recover costs some years after a cleanup was completed under an agreement between the site owner/operator and the EPA. *See Navistar,* 152 F.3d at 704. The issue in *Navistar* was whether certain activities by the site owner, acting under a judicially-approved consent decree obtained by the EPA, constituted "initiation of physical on-site construction" of the final remedy under CERCLA's six-year limitations provision for "remedial" actions found at § 113(g)(2)(B). *Id.* at 711. The three-year "removal" limita-

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[6] Under G&M's theory, if an owner performs some removal work elsewhere on a site in response to a different release or remedial work begins elsewhere at the plant, any claim against a contractor like G&M would be time barred, possibly *before* the offending activities occurred.

tions period of § 113(g)(2)(A) was not even discussed. *Id.* at 708 ("There is no dispute here that a 'remedial action' is involved."). The instant case involves the alleged liability of an environmental contractor stemming from its activities during an on-going environmental assessment at the site. In *Navistar,* the activities of waste hauler Navistar were irrelevant to the CERCLA statute of limitations trigger events analyzed in that case. However, in this action, G&M's activities at the site as an environmental contractor are critical to the issue of CERCLA's statute of limitations because they allegedly contributed to a release at the site while performing some "response" type function. Thus, *Navistar* pertains to which construction activity triggered the six-year "remedial" limitations period, while the instant case involves whether the activities were "removal" vs. "remedial."

The Sixth Circuit's decision and the facts in *Kelly v. E. I. DuPont De Nemours and Co.*, 17 F.3d 836 (6th Cir. 1994), are also readily distinguishable from the present case. Like *Navistar,* the *Kelly* case involved a government action to recover from an off-site arranger and the site owner/operator response costs incurred in the 1980s to remedy contamination that occurred in the 1950s and 1960s. *Id.* at 838-839. The primary issue in *Kelly* was whether various removal actions should be considered separately under CERCLA's statute of limitations analysis. *Id.* at 840. Again, this was a classic case of historical contamination at a landfill caused by an off-site generator sending wastes for disposal and a response action conducted many years later. Thus the relevant activities for limitations purposes would not have been those conducted in the 1950s and 1960s during the time frame of disposal activities, but rather the response actions taken later in the 1980s. The court in *Kelly* evaluated those response actions and found them to be part of one removal action. Neither the *Navistar* nor the *Kelly* decisions conflict with the decision by the Fifth Circuit in this case.

Under G&M's theory of CERCLA's statute of limitations, a contractor like G&M might escape CERCLA liability. Suppose a facility owner began remediation at a facility and six years later hires a contractor who installs at the facility defective wells that cause a distinct release of contaminants. Under G&M's interpretation of CERCLA's limitations provision, a CERCLA claim for the later release would be automatically barred under CERCLA's statute of limitations based on the initiation of the prior, distinct remedial action. CERCLA's statute of limitations for a particular "release" simply cannot begin to run until the time that "release" occurs and a remedial action is conducted to address that "release." Thus, the Fifth Circuit was correct in focusing on those activities conducted during and after G&M's involvement at the LCCC in applying CERCLA's statute of limitations to the releases caused by G&M at the LCCC.

II. CERCLA Contains No Special Exclusion from "Operator" Liability for Environmental Contractors.

Faced with the imposition of CERCLA "operator" liability, G&M attempts to carve out an exemption for environmental contractors which simply does not exist.[7] The cornerstone of G&M's misapplication of CERCLA's operator liability provision lies in its attempt to improperly limit CERCLA's definition of "facility." A "facility" under CERCLA includes:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), **well,** pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or

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[7] Congress specifically excluded from CERCLA liability a certain class of "response action contractors." 42 U.S.C. § 9619. However, G&M does not meet the requirements of this section, and G&M does not now argue that it was acting as a "response action contractor" at the LCCC.

> (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located ....

42 U.S.C. § 9601(9) (emphasis added). G&M attempts to limit the applicable "facility" in this case to the entire LCCC; i.e., one would have to be the operator of the entire LCCC in order to be liable under CERCLA. While the LCCC can be a facility under CERCLA, groundwater monitor *wells* can also be CERCLA facilities. *See id.* G&M's attempt to limit this definition of facility is directly contrary to the language and policy of CERCLA. Contractors can be liable under CERCLA as arrangers or transporters. *See Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988); *see also Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341-42 (9th Cir. 1992) (holding that a contractor excavator could be liable as a CERCLA "operator").

G&M also attempts to fuse its narrow interpretation of facility into the Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). *See* Writ Petition, p. 21-22. *Bestfoods* did not limit the application of a CERCLA facility or its meaning in connection with operator liability. Thus, incorporating CERCLA's broad definition of facility into the application of CERCLA's operator liability scheme as examined under *Bestfoods* shows that the Fifth Circuit applied the correct legal standard to the facts at hand. *Bestfoods* states that "an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility." *See* Writ Petition, p. 21, citing *Bestfoods*, 524 U.S. at 66. It is certainly possible for G&M to be found at trial to have "operated" the defective wells that qualify as CERCLA "facilities." The Fifth Circuit applied the correct standard.

Finally, there is no conflict between the Fifth Circuit's decision in this case and *Blasland, Bouck & Lee, Inc. v. City of*

North Miami, 96 F. Supp.2d 1375 (S.D. Fla. 2000). First, the environmental contractor in *Blasland* was specifically found to be a "response action contractor" as defined under 42 U.S.C. § 9619. *Id.* at 1378. Second, and more importantly, there was no evidence that the environmental contractor in *Blasland* had conducted any affirmative action causing the spread of contamination to uncontaminated areas. *Id.* at 1380. Implicit in the *Blasland* decision is that had the contractor exacerbated the contamination, it could have been liable under CERCLA. G&M is not a "response action contractor." Further, whether G&M's activities caused the exacerbation of contamination at the LCCC is a central issue in dispute in this case. Thus, *Blasland* is distinguishable and fails to support G&M's propositions regarding CERCLA's operator liability.

G&M's argument that environmental contractor liability undermines CERCLA's policies is also erroneous. First, Congress has spoken — there is an exclusion only for those who fit the definition of "response action contractor" — so CERCLA's policy is irrelevant on this point. Second, the case law rejects any such argument. *See Tanglewood,* 849 F.2d at 1573; *Kaiser,* 976 F.2d at 1341-42. Finally, a central CERCLA policy is to make the polluter pay, and if G&M caused the contamination and meets CERCLA's definition of "operator" (or "arranger"), G&M should pay.

Given the status of CERCLA operator liability, the Fifth Circuit correctly applied the law to G&M and left for the trier of fact the ultimate decision of whether G&M controlled the relevant facility.

III. The Fifth Circuit Followed the "Totality of the Circumstances" Test for "Arranger" Liability, Which Includes Intent as a Factor.

The Fifth Circuit reversed the district court, holding that the "totality of the circumstances" must be taken into account in determining whether a sufficient nexus is present to label a party as a CERCLA "arranger." Pet.'s App., 22a. In its totality of the circumstances test, the Fifth Circuit pointed to two possible factors for review: (1) if and how a "disposal" has taken place and (2) the degree of control over the disposal in question by the party. *Id.* at 21a-22a. In doing so, the Fifth Circuit did not ignore the "intent" issue as suggested by G&M, but effectively made intent one of the factors for review by the district court to determine whether a party is an arranger under CERCLA. This instruction by the Fifth Circuit provides the district courts with more than sufficient instruction regarding arranger liability.

The "totality of the circumstances" test is also not wholly inconsistent with those cases requiring some form of intent to label a party as an arranger. If intent is present, it is strong factor in finding liability as an arranger. However, even when the specific intent to dispose may not be present, other factors outweighing such an intent often support imposition of CERCLA liability. Using G&M's example of an "accidental" spill (see Writ Petition, p. 26), the supplier may have had special knowledge regarding the proper transport and delivery of a particular chemical, the supplier may have controlled the unloading procedure used that resulted in the spill, and the supplier may have negligently provided improper unloading procedures that impacted the spill. Under these circumstances, CERCLA's policy to hold the party responsible for a release liable for the resulting clean-up costs would call for the imposition of arranger liability. Given the facts in this case, the Fifth Circuit properly reversed and remanded to the district court for a review of the "totality of the

circumstances" regarding G&M's activity at the LCCC as an arranger under CERCLA.

CONCLUSION

For these reasons, G&M's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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